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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN,
Petitioner

v.

PROGRESS MARINE, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit erred in deciding that the term "compulsory by law" in the context of the applicable policy of marine insurance did not preclude recovery by Respondent, Petitioner's insured, of costs of wreck removal expenses in absence of an order of the United States Government or a United States Court or a similar authority making the removal of the Respondent's barge compulsory in accordance with *Seaboard Shipping Corporation v. Jocharanne Tug Boat Corporation,* 461 F.2d 500 (2nd Cir. 1972).

2. Whether the United States Court of Appeals for the Fifth Circuit erred in deciding that the term "compulsory by law" in the context of the marine insurance policy in question was not a term of art, thereby allowing the Court to fashion its own definition in direct opposition to the evidence in the record and the holding of the United States Court of Appeals for the Second Circuit in *Seaboard Shipping Corporation v. Jocharanne Tug Boat Corporation,* (supra).

LIST OF ALL PARTIES BELOW

1. Progress Marine, Inc. — Plaintiff/Appellant/Respondent.

2. Foremost Insurance Company of Grand Rapids, Michigan — Defendant/Appellee/Petitioner.

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REFERENCE TO OPINIONS BELOW

The Judgment and Findings of Fact and Conclusions of Law entered by the United States District Court for the Southern District of Texas—Houston Division in favor of Petitioner are printed in Appendix A hereto and are reported at 1979 A.M.C. 70 (S.D. Tex. 1978).

The order of the United States Court of Appeals for the Fifth Circuit granting Respondent's appeal and vacating and remanding the trial court judgment is printed in Appendix A and is reported at 642 F.2d 816 (5th Cir. 1980).

JURISDICTIONAL GROUNDS IN THIS COURT

The order of the United States Court of Appeals for the Fifth Circuit granting Respondent's appeal and vacating and remanding the trial court judgment is printed in Appendix "C" hereto and was entered on April 15, 1981.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1) and under Rule 17 1.(a) and (c) of the Supreme Court Rules, the latter which states as follows:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . .
>
> (c) When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, . . .

STATEMENT OF THE CASE

Petitioners seek Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit which vacated and remanded a Judgment rendered in the Petitioner's favor by the United States District Court for the Southern District of Texas, Houston Division. The District Court rendered Judgment on behalf of your Petitioner, the Defendant at the trial level, on the grounds that the words "compulsory by law" in the relevant

protection and indemnity policy between your Petitioner as Insurer and Plaintiff at the trial level as Insured, restricted coverage to costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal had been directed by an express order from a governmental body and that, as a matter of fact, there was no compulsion under a direct order or otherwise from anyone to remove the wreck. The said removal was unilaterally effected by the Insured as a matter of general prudence.

The United States Court of Appeals for the Fifth Circuit vacated and remanded the District Court's Judgment and held that, under the protection and indemnity policy insuring against ". . . costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein, when such removal is compulsory by law . . . ," the words "compulsory by law" were not terms of art and not restricted to situations in which an express direct order from a governmental body or any other authoritative source, directed removal; rather where failure to remove would have reasonably exposed Insured to liability imposed by law sufficiently great to justify expense of removal, such removal could be considered "compelled by law." Both the result and the reasoning of the Court of Appeals for the Fifth Circuit brings that Court's decision in direct conflict with the decision in *Seaboard Shipping Corporation v. Jocharanne Tug Boat Corporation*, 461 F.2d 500, 504, 1972 A.M.C. 2151 (2nd Cir. 1972), printed in Appendix B.

THE FACTS

This was a suit for reimbursement of wreck removal expenses allegedly due under the policy of marine pro-

tection and indemnity insurance covering, among other vessels, the jack-up workover barge PMI II, which policy was in effect at the time of a casualty involving the capsizing and sinking of said barge in the Gulf of Mexico approximately eleven nautical miles off the coast of Louisiana in waters within an approximate depth of 56 feet, in the vicinity of producing platforms, pipelines and other marine offshore properties and in an area frequently navigated by vessels, including those servicing properties. Plaintiff in this action was the demise charterer and operator of the jack-up workover barge PMI II and the Insured under the relevant marine protection and indemnity insurance covering this barge. The Defendant was the insurance company that issued said policy.

The barge PMI II, while in tow, by the tug ADMIRAL LEE on June 1, 1975, in daylight in calm waters, capsized and sank in the Gulf of Mexico as a result of negligence on the part of the tool pusher of the PMI II and of her barge captain and as a result of the vicarious negligence of Progress Marine, Inc., the Plaintiff, their employer and the operator of the barge. The United States Coast Guard cabled Plaintiff on June 5, 1975, advising it that the wreck constituted a hazard to navigation and instructed the Plaintiff to properly mark the wreck by day and by night.

Plaintiff and the barge PMI II were covered by the policy of marine protection and indemnity insurance which was issued by Defendant in San Francisco, California on September 19, 1974, on a standard printed form designated as "SP-38". Plaintiff relies on lines 19-21 of this policy and they read as follows:

> "Costs of expenses of, or incidental to, the removal of the wreck of the vessel named herein *where such*

> *removal is compulsory by law,* provided however that there shall be deducted from such claim the value of any salvage recovered from the wreck by the insured. . . ." (Emphasis added)

Shortly after June 1, 1975 Plaintiff unsuccessfully attempted to salvage the barge and on or about June 10, 1975 Plaintiff attempted to abandon the wreck to hull underwriter, which abandonment was rejected. On or about June 10, 1975 Plaintiff gave notice to Defendant of the capsizing of the PMI II. On or about June 20, 1975 after soliciting bids for the removal of the wreck Plaintiff entered into a no cure no pay salvage contract with Sun Salvage, Inc. and pursuant to that salvage contract, the wreckage of the PMI II was brought by the contractor to Morgan City, Louisiana on or about August 21, 1975. The wreckage of the barge was sold to the highest bidder, proceeds of the sale being $127,-557.00 minus $1,580.00 representing reasonable expenses connected with the sale. Progress sought recovery of net wreck removal expenses after salvage sale of recovered parts amounting to $641,552.98.

Plaintiff indicated that once sue and labor activities had been completed and hull writers had rejected abandonment, it was advised by its own lawyer that it was legally obligated to immediately remove the wreck. Plaintiff did not discuss any of the procedures with the Defendant Insurer at the time nor were any of the salvage contract bids submitted to its Insurer for approval. At no time prior to its actual removal by Plaintiff did the U.S. Corp of Engineers or any other governmental body or court of competent jurisdiction order, nor did anyone private or otherwise, ever request Plaintiff to remove

the capsized barge. The PMI II after the sinking and prior to its salvage was some eleven nautical miles off the coast of Louisiana in open and unobstructed navigable waters of the Gulf of Mexico.

Regarding negotiations and execution of the relevant policy, Plaintiff Insured and its broker thoroughly reviewed and accepted the particular policy without objection. Coverage for the expenditure involved in this litigation was available and is demonstrated by the fact that Plaintiff maintained appropriate "debris removal" coverage on other equipment where removal was unrestricted. Plaintiff chose to buy the cheaper coverage so restricted by the term "compulsory by law" for this particular rig.

The present action was commenced on October 21, 1977. After a full trial on liability and damages, judgment was entered for Defendant on May 30, 1978. The Findings of Fact and Conclusions of Law of the trial court are produced in Appendix A to this petition.

The trial court in its Conclusions of Law found that the Rivers and Harbor Act, 33 U.S.C.A. § 409, did not extend to the site of the wreck of the PMI II because the U. S. Corps of Engineers' removal authority through that act is confined to vessels or other craft "wrecked and sunk in a navigable channel". This term "navigable channel" applies to inland waterway locale and the PMI II sunk eleven nautical miles off the coast of Louisiana in open and unrestricted waters of the Gulf of Mexico and therefore the wreck situs of the barge was not a "navigable channel" within the meaning of the Rivers and Harbor Act, § 409.

The trial court further found that the coverage of the Rivers and Harbor Act, § 409, was not extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333 and therefore did not give the Secretary of the Army authority to compel the removal of a wreck situated as was the PMI II and further that the Outer Continental Shelf Lands Act did not expressly or impliedly deal with wreck removal. The trial court found that under the circumstances of this case that Plaintiff was not compelled by law and could not be so compelled under the Rivers and Harbor Act to remove the wreck and therefore Plaintiff took nothing by its suit.

Plaintiff Progress Marine, appealed the District Court's denial of its claim against Foremost Insurance Company for expenses incurred in removing the wreck. The decision of the Fifth Circuit on appeal of this case is reproduced in Appendix "A".

In its decision that the District Court erred in its interpretation of the term "compulsory by law" and therefore applied an improper legal standard in the resolution of this case, the Fifth Circuit stated that its primary object was to determine the meaning of the words "compulsory by law" as they were used in the protection and indemnity policy in issue in this case.

The Fifth Circuit, noting that this question was one of first instance before it, addressed the decision in *Jocharanne, supra,* out of the Second Circuit and defined that case as "certainly a close cousin of the policy in our case, if not an identical twin". The Second Circuit in *Jocharanne* addressed the term "compulsory removal," stating that this term "is a *term of art* in admiralty law and refers to a situation in which a hull has been aban-

doned by the owner and the hull underwriter but, *pursuant to government order,* must be removed from navigable waters. Under those circumstances, the P & I underwriter, absorbing costs which no one else remains liable to pay, must remove the wreck or reimburse the government for removal." (Emphasis added).

The Fifth Circuit further stated that the District Court's decision in the instant case made findings consistent with *Jocharanne,* concluding that the removal by Plaintiff was not "compulsory by law" because at no time prior to its actual removal by Plaintiff did the U.S. Corps of Engineers, any governmental body, or any Court of competent jurisdiction order Plaintiff to remove the wreck and that no governmental body had authority to order removal of the wreck. The Fifth Circuit noted that another district court, *Continental Oil Company v. Bonanza Corporation,* (S.D. Tex. 1980) [unreported at the time of preparation of this Petition; but which Findings of Fact and Conclusions of Law are presented in Appendix "B"] had found subsequent to the District Court Judgment for your Petitioner for the charterer of a sunken vessel seeking to recover reimbursement for wreck removal from its Insurer under a policy which contained a provision requiring payment of wreck removal expenses when such removal was compulsory by law. In that case the Insurer Defendant pointed to the decision in *Jocharanne* and the District Court decision in the case before this Court as standing for the proposition that removal is "compulsory by law" only where a written demand has been made by a governmental authority. The District Court found in *Continental Oil* that "such a restricted interpretation of the language is unjustified". *Continental Oil v. Bonanza* is not on point or relevant to this case.

The Fifth Circuit found itself unable to agree with the Second Circuit decision in *Jocharanne* that removal which is "compulsory by law" requires a peremptory order by an authoritative governmental agency or Court. The Fifth Circuit by implication, in this instant decision, no longer defined terms such as "compulsory removal" or its twin, "compulsory by law" as a term of art in admiralty law. The Fifth Circuit further redefined this term. This term of admiralty law has under *Jocharanne* two elements, the first being (1) reference to a situation in which a hull has been abandoned by the owner and the underwriters and (2) pursuant to governmental order, must be removed from navigable waters. The Fifth Circuit has removed the second element of the definition and consequently is in conflict with the Second Circuit.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS REGARDING WHETHER THE TERMS "COMPULSORY BY LAW" AND "COMPULSORY REMOVAL" PRECLUDE RECOVERY OF WRECK REMOVAL EXPENSES IN THE ABSENCE OF AN ORDER OF THE UNITED STATES GOVERNMENT, A UNITED STATES COURT OR SIMILAR AUTHORITY.

When the United States Court of Appeals for the Fifth Circuit determined in the present case that the term "compulsory by law" in the context of the applicable policy of marine insurance did not preclude recovery by the insured of its costs of wreck removal expenses in

the absence of an order of the United States Government, a United States Court or similar authority making the removal of the Respondent's barge compulsory, the Fifth Circuit came in direct conflict with the decision of the United States Court of Appeals for the Second Circuit, in *Seaboard Shipping Corporation v. Jocharanne Tug Boat Corporation, supra,* which decided in 1972 that the term "compulsory removal" required more than the pressure from the Coast Guard, other governmental authorities in the area and hypothetical disasters.

The resolution of the conflict of opinion between the United States Court of Appeals for the Fifth Circuit, in this present case, and the decision in *Jocharanne* by the United States Court of Appeals for the Second Circuit is necessary for the establishment of a uniformity of judgments. The conflict between the Fifth Circuit and Second Circuit decisions is a genuine conflict in fact and in principle. The conflict between the Circuit Courts requires clarification by this tribunal of a contractual ground rule of fundamental significance in the admiralty and marine insurance industry. Without resolution of this conflict, members of this industry, whether insured or insurer, will enter into contractual relationships without assurance of the interpretation of the terms of art "compulsory by law" and "compulsory removal".

Seaboard Shipping Corporation v. Jocharanne Tug Boat Corporation, 461 F.2d 500 (2nd Cir. 1972) was an action against a tug boat corporation to recover for the rental of barge and tug to offload gasoline from the corporation's barge; Plaintiff served an amended complaint upon three underwriters, one of which cross-claimed against the others to recover for a sum expended in defense and settlement of third party litigation insti-

tuted by salvors. Oceanus Mutual Underwriting Association, Ltd. (Oceanus) appealed from a judgment of the United States District Court for the Southern District of New York which required it to contribute a portion of a sum expended by Lloyd's of London, another of the three underwriters, to remove the stranded and damaged barge insured by both parties, from its grounding. The portion of the trial court judgment holding Oceanus liable to Lloyd's was reversed on the grounds that the basis for Oceanus' obligation to reimburse Lloyd's lay in a term of Oceanus' policy insuring against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory".

The Oceanus policy did not contain a "sue and labor" clause whereas the policies of Lloyd's and the third insurance company did, these being expenses spent by the insured or its representative in an effort to mitigate damage and loss once an accident has occurred.

Lloyd's argued before the Second Circuit that pressure from the Coast Guard and other governmental authorities in the area was sufficient to make the removal of the barge compulsory. The Second Circuit disagreed and the basis for its reversal on behalf of Oceanus was "that compulsory removal *is a term of art in admiralty law*, referring to a situation in which a hull has been abandoned by the owner and the hull underwriters, but, pursuant to government order, must be removed from navigable waters. Under those circumstances, the P & I underwriters, absorbing costs which no one else remains liable to pay, must remove the wreck or reimburse the government for removal." The bottom line from the Second Circuit was that "there was no 'compulsory removal' of

the VAL 51, the barge in question." In the facts of *Jocharanne*, Lloyd's and Jocharanne far from abandoning their interest in the vessel, had it towed to New York for salvage of the hull; no government order existed, just as no government order existed in the present case. The Second Circuit concluded on this point that "the cost of the operation were therefore not chargable to Oceanus as removal under its policy."

The Fifth Circuit, in the present case, not only noted the existence of *Jocharanne* but found kinship as a "close cousin" if not twinship, to the instant case before the Fifth Circuit. Before the Fifth Circuit, Progress sought to distinguish this present case on its facts from *Jocharanne* stating that there was no "true abandonment" of the hull in *Jocharanne*, but that the case represented a salvage and sue and labor operation on behalf of hull and/or cargo underwriters and not a wreck removal situation. Foremost readily admits that the Court in *Jocharanne* was faced with the initial determination of whether the facts and circumstances illustrated an intent on the part of the owners to abandon and undertake wreck removal operations or attempt the salvage operation. This is precisely the threshold issue in the instant litigation. Foremost argued before the Fifth Circuit that Progress did in fact and without legal compulsion undertake a salvage operation and ultimately hauled the various component parts of the PMI II by barge to Morgan City, Louisiana. Progress made no attempt to notify its insurer of any problem until after salvage operations were undertaken. A further indication of the kinship between *Jocharanne* and the present case lies in their common element of hypothetical disaster. In the instant case, the Respondent has contended that denial

of its claim under the term "compulsory by law" would force it to engage in what it considered impermissible abandonment, exposing lives and property in the area to danger while awaiting a governmental order to remove the sunken barge. The Second Circuit in *Jocharanne* confronted a situation of similar danger in that gas leaking from the VAL 51 barge at all times presented an explosion hazard immediately offshore Oswego, New York. Nevertheless, the Second Circuit held that the expense of the removal to be covered must be compelled by *governmental order* and not a hypothetical disaster.

The Fifth Circuit in the instant decision also based its decision for overruling the trial court on a conflict within its own circuit between district courts, the conflict lying between the district court decision in this instant case and that in *Continental Oil Company v. Bonanza Corporation*, H-78-944, August 25, 1980, [not reported at the time of the preparation of this petition; the Findings of Fact and Conclusions of Law in *Bonanza* are presented in Appendix "B".]

The primary issue in *Bonanza* was whether or not there had been a change in management and navigation of the offending vessel, M/V AQUA SAFARI, therefore avoiding recovery under the marine hull and machinery and protection and indemnity insurance policy. The District court found that at no time had there been any such change.

In the portion of the *Bonanza* opinion related to the issues in this petition, the trial court merely states that recovery for wreck removal when "compulsory by law" requires legal compulsion to remove the wreck, but that "compulsory by law" did not require a *written* demand

made by a governmental authority. The Court cited *Heep L. Buglass, Marine Insurance and General Average in the U.S.* (1973): "protection and indemnity underwriters do cover wreck removal expenses but it must be emphasised that, absent any specific agreement to the contrary, underwriters insuring wreck removal expenses are only liable if their assured is legally liable for removing the wreck." The District Court, Appendix "B", states that the plaintiff Conoco who had spent money to remove the wreck from its own lease was required under its lease agreement with the United States government to remove all equipment and debris from the lease premises one year after termination of the lease. This was a legal obligation. Conoco was certainly legally compelled by the terms of that contract with the United States government to remove the wreck of the M/V AQUA SAFARI regardless of the circumstances of her sinking.

In this present case, Respondent Progress Marine, Inc. was not the lessee of the bottom or surface of the waters in which its drilling barge was wrecked, but to the contrary, Progress Marine had no contractual liability to anyone nor any statutory liability to anyone to remove the wreck of the drilling barge PMI II.

The effect of the district court opinion in *Bonanza* is that if Plaintiff/assured, Conoco, had a contractual obligation with the United States government to clear debris from the lease premises, the terms and conditions of that lease provided the legal obligation to make said removal "compulsory by law".

In short, the terms of the insurance policy and the terms of the contract between the insured and its lessor combined in *Bonanza* to assure the plaintiff that its wreck

removal expense under the circumstances of the case were indeed covered by its insurance policy. The circumstances of the lease and the insurance contract meet the explanation of *Buglass, supra*: . . . "underwriters insuring wreck removal expenses are only liable if their assured is *legally liable* for removing the wreck." (Emphasis added). In *Bonanza,* the assured was legally liable for removing the wreck through its lease.

The present case bears no resemblance in this issue to *Bonanza.*

The resultant reasoning of the Fifth Circuit in the above discussion demonstrates genuine legal and factual conflict with the facts and legal reasoning in the decision of the Second Circuit in *Jocharanne* and Certiorari should be granted to reslove that conflict.

II.

THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ERRED IN DECIDING THAT THE TERM "COMPULSORY BY LAW" IN THE CONTEXT OF THE MARINE INSURANCE POLICY IN QUESTION WAS NOT A TERM OF ART, THEREBY ALLOWING THE COURT TO FASHION ITS OWN DEFINITION IN DIRECT OPPOSITION TO THE EVIDENCE IN THE RECORD, THE HOLDING OF THE TRIAL COURT AND THE HOLDING OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, IN *JOCHARANNE.*

The Fifth Circuit chose to strip the term "compulsory by law" of its characteristics as a term of art and to construe the term "compulsory by law" and each of its

member words in their "plain, ordinary and popular sense" in direct opposition to the evidence presented before the trial court and without any cited authority.

Foremost Insurance Company presented three witnesses that were qualified as experts on the subject of marine insurance policies and the specific language in issue.

Luther C. Fuqua, with more than 20 years of experience as a representative of marine insurance underwriters, testified to the following in response to questions from counsel for Foremost:

Q) Can you tell us what a broker's function is and what an underwriter's function is? And I suppose you were serving in that function as a managing agent in placing the underwriting, is that correct?

A) Well, an agent/broker represents his client to the underwriter. Then the managing general agent or surplus broker represents the—he acts as intermediary between the insurance company and the client or client/broker. (p. 105, l. 6-14, trial transcript)

Q) Would you explain to the Court what underwriters special risks is and what the majority of your responsibilities are?

A) Well, underwriters special risks is an intermediary or correspondent with Lloyd's and other companies.

Q) . . . tell us primarily what you underwrite, Mr. Fuqua.

A) Well, primarily it's the business of the oil exploration and production type, platforms, rigs.

Q) Platforms, rigs, service vessels and other related items?

A) Right. (p. 105, l. 21 through p. 106 l. 8, trial transcript.)

Q) Have you become or had occasion to become familiar with various types of coverage available having to do with wreck removal or debris removal?

A) Yes. (p. 106, l. 14-17, trial transcript).

Witness Fuqua distinguished the language in removal of debris clause and hull policies insuring drilling vessels which do not contain "compulsory by law" language from lines 19 through 21 containing "compulsory by law" in protection and indemnity form SB-38 in litigation before the trial court.

Q) In your opinion what do the words "compulsory by law" mean in the industry or trade as they are used in that clause?

A) Well, I think that it means in the insurance in-industry that the body having jurisdiction over the removal of this thing can compel you to remove it. In which case, it is usually the Corp of Engineers. If they say the vessel must be moved, it is therefore considered to be compulsory. (p. 110, l. 24 through p. 111, l. 11, trial transcript).

The Court: Suppose I were to be insured by one of your companies and a drilling rig capsized and I contacted you? Would you tell me I had to wait for the Corp of Engineers, under that clause, I would have to do this and wait for them to order us before you could do anything?

A) Yes, I think so. We would want some advice from whomever had jurisdiction in that matter to say, yes, it must or—

The Court: You would tell the insured that?

A) Yes, I think we would. I mean in some cases it's not necessary. I think the Corp might say you can destroy it or cut it up where it is without actually removing it. But whatever they say, we look to them as the jurisdiction over it. (p. 112, l. 3-25, trial transcript).

Petitioner's second expert witness on this term of art was Walter E. Tesch, an underwriter, claimsman and broker continually since 1923. His testimony at trial was:

Q) How does a company—let's use XYZ drilling company? How did they go about getting insurance? . . . (Deletion)
A) They would normally contact one of several different agents and present a program to them and we would make our recommendations. (p. 138, l. 4-8, trial transcript).

In reference to a hypothetical question presented by Foremost Insurance Company's counsel regarding the clause pertaining to wreck removal expenses which carried the relevant lines 19 through 21, Mr. Tesch testified:

Q) Assume that no one—I mean no entity at all—either orally or in writing demanded that XYZ drilling company remove the rig . . . (deletions).
A) I see lines 19 through 21 are reinstated . . . no, it would not be covered by this form (p. 142, l. 7 through p. 143, l. 1, trial transcript).

On cross-examination by counsel for Progress Marine, Mr. Tesch testified:

Q) What do these words mean to you, compulsory by law?
A) They mean that you have to be put on notice by the Engineers that they have to be removed. (p. 145, l. 24-26, trial transcript).

Albert Ortiz, with 19 years of experience in marine insurance and related business, was qualified as an expert in regard to marine insurance policies and testified for Foremost as follows regarding the meaning of "compulsory by law".

A) My interpretation, of course, would be that my insured would have to be compelled by some board, government board with proper authority to remove the wreck. And we would cover such expenses.
Q) But only in the event of such compulsion?
A) Right. Oh, yes sir.
Q) Such as a wire from the Corp of Engineers?
A) The Corp of Engineers would be it. (p. 163, l. 25 through p. 164, l. 7, trial transcript).

It should be noted that no credible evidence demonstrating an ambiguity in the phrase "compulsory by law" was presented by Progress at the time of trial. Plaintiff's witness in chief, Raymond Ellison, testified he had only a layman's knowledge of insurance, the same being confined to his personal home insurance policy. (p. 19, l. 22 through p. 20, l. 4, trial transcript). He made mention of what he wanted or hoped this wreck removal coverage would be but could not presume and did not attempt to hold himself out as being qualified to testify to what "compulsory by law" meant in the policy in question. (p. 30, l. 17 through p. 20, l. 22, trial transcript).

Further Mr. Ellison testified that coverage in regard to the equipment in question was investigated, managed and obtained by Robert Duncan, insurance manager for Progress, and the company's insurance brokers, the latter being by inference members of the trade and industry. (p. 100, l. 14 through l. 22; p. 169, l. 13 through p. 170, l. 11, trial transcript).

Progress produced only one witness, James W. Hunt, in rebuttal to Foremost's three experts on the issue of the meaning of "compulsory by law" beforementioned, but this witness nullified the value of his testimony regarding the meaning of "compulsory by law" when he admitted that his company, the Diamond M Drilling Company, through which he had gained his insurance "expertise" does not use the questioned SP-38 forms, but rather the SP-23 form. Mr. Hunt further admitted in response to questioning by the Court that he has never had occasion to make a claim on the SP-38 form. His assertion that the SP-38 and SP-23 form wreck removal provisions are identical is *rank hearsay*, the best evidence of the latter form's language being a copy of same. Such a document was not offered by Progress nor admitted at any time during the trial of this case, (p. 172 through p. 179, trial transcript).

On cross examination, Mr. Hunt admitted that he has never received any advice from anyone on the interpretation of the SP-38 form, thereby fully corroborating his lack of expertise in the area examined. He disqualified himself as an expert on the legal meaning of "compulsory by law" in his response to questions about the definition of "compulsory by law" as defined by the United States Court of Appeals, Second Circuit in *Jocharanne* (p. 182, l. 10 through l. 17).

The trial record demonstrates that no evidence was presented by Progress to refute Foremost's expert testimony that "compulsory by law" was a term of art; Mr. Ellison and Mr. Hunt, witnesses for Progress on this subject, testified that they were not experts in this area. It is noted that Robert Duncan, identified by Mr. Ellison as Progress' insurance manager and the member of the

insurance trade and industry who initiated and negotiated the questioned coverage, was present in the courtroom at the time of trial but did not testify during the trial to the issue of term of art or to any other issue in litigation. Where a witness is available to testify, has superior and non-cumulative testimony to offer, or peculiar or special knowledge or facts essential to a particular party's case, failure to call that witness creates an inference that his testimony would have been unfavorable. *Georgia Southern and Florida Railway Company v. Perry*, 326 F.2d 921, 925 (5th Cir. 1964), *2 Wigmore on Evidence*, § 285. This rule is particularly true where it can be inferred that this witness' testimony would ordinarily tend to be favorable to the party which failed to call him. *Dow Chemical Company (U.K.) v. S/S Giovanella D'Amico*, 297 F. Supp. 699, 701 (S.D. N.Y. 1969).

In addition, although it is true that the parties stipulated at trial that the marine insurance policy was issued on a standard P & I form (denominated SP-38) and that there were no formal negotiations between Progress and Foremost regarding the form of the policy, (Vol. I, p. 176, trial transcript), it is also true that Progress as well as its own broker thoroughly reviewed and accepted the particular policy without objection. (p. 169, l. 13 through p. 170, l. 11, trial transcript). Coverage for "non-compulsory" wreck removal or wreck removal at the insured's option, generally termed "debris removal," was indeed available, as corroborated by the fact that Progress maintained "debris removal" coverage on other equipment. (Vol. I, p. 13, trial transcript). Progress may have acted prudently under all of the circumstances. That, however, is irrelevant since the clause in question did not propose to insure Petitioner's prudent removal of

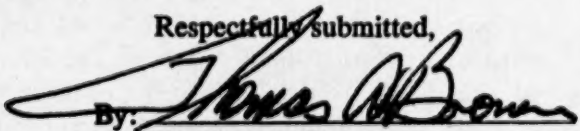
the wreck of the PMI II, but only such removal *as compelled by law.*

CONCLUSION

This Court, as were the United States Court of Appeals, Fifth Circuit and the District Court at trial, is primarily faced with construction of the phrase "compulsory by law" as used in the applicable policy of marine insurance. Petitioner respectfully submits that this phrase has one meaning which has been established in *Jocharanne,* said decision now in direct conflict with the decision in the present case by the United States Court of Appeals, Fifth Circuit. Petitioner further submits that the Fifth Circuit's construction of a new definition for the phrase "compulsory by law" outside the mode of term of art is in direct opposition to the evidence in the record, and that in fact Respondent Progress did not present evidence to rebut Petitioner's evidence that "compulsory by law" was a term of art in the marine insurance industry.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

By: 

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APPENDIX

APPENDIX "A"

PROGRESS MARINE, INC.
Plaintiff-Appellant,

v.

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN,
Defendant-Appellee.

No. 78-2321.

United States Court of Appeals,
Fifth Circuit.

April 15, 1981.

Insured brought suit against insurer for expenses incurred in removing wreck of one of its barges. The United States District Court for the Southern District of Texas, at Houston, Robert O'Conor, Jr., J., denied claim, and insured appealed. The Court of Appeals, Brown, Circuit Judge, held that under protection and indemnity policy insuring against "* * * Costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law * * *," words "compulsory by law" were not restricted to situations in which express direct order from government body directed removal; rather where failure to remove would have reasonably exposed insured to liability imposed by law sufficiently great to justify expense of removal, such removal could be considered "compelled by law."

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, GEWIN and POLITZ, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Progress Marine, Inc. (PMI) appeals the District Court's[1] denial of its claim against Foremost Insurance Company (Insurer) for expenses incurred in removing the wreck of a Jackup Workover Barge (PM II) which sank some 11 miles off the Louisiana coast. PM II was covered by a marine P&I insurance policy which provided recovery for wreck removal expenses when "such removal is compulsory by law." Because we find that the District Court erred in its interpretation of the term "compulsory by law", and accordingly applied an improper legal standard in the resolution of this case, we vacate and remand.

Eight Fathoms Of Barge In Nine Fathoms Of Water

The essential facts of this case are not in dispute. On the afternoon of June 1, 1975, PMI's Jackup Workover Barge PM II capsized and sank, while being towed, in approximately 56 feet of water some 11 miles off the Louisiana coast. The capsizing and sinking was the result of negligence on the part of the tool pusher and barge captain of the PM II and thus of PMI. In its submerged position, the PM II was located approximately 1500 feet south of a manned Shell Oil production platform and 300 feet southeast of an Exxon Pipeline Company 10-

1. *Progress Marine, Inc. v. Foremost Insurance Co.*, 1979 A.M.C. 70 (S.D. Tex. 1978).

inch high-pressure pipeline. Also in the vicinity were other offshore platforms, pipelines and additional offshore developmental properties.

At the time of this unfortunate incident, the PM II was covered by a standard P&I insurance policy, form SP-38, issued by Insurer. The Protection and Indemnity policy obligated Insurer to reimburse PMI for such sums as PMI shall have become legally liable to pay and shall have paid on account of:

> . . . Costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law . . .[2]

After the sinking of the PM II, little time was wasted by PMI in dealing with the situation. First, after considerable effort, PMI was able to rescue five crewmen trapped inside the submerged barge. PMI then pursued, unsuccessfully, various "sue and labor" activities, designed to prevent the barge from becoming a total loss. Finally, on June 10, 1975, PMI notified Insurer that the barge was a constructive total loss and that PMI had abandoned the wreck to Insurer. Insurer, in turn, rejected abandonment.

Unsuccessful in its sue and labor efforts PMI proceeded on the advice of counsel, to make arrangements for removing the PM II. On June 20, after receiving various bids, PMI contracted with Sun Salvors on a "No Cure-No Pay" basis to remove the wreck to PMI's premises in Morgan City, Louisiana. By August 21, Sun Salvors had performed the removal and PMI paid over $760,000

2. The clause continued ". . . provided, however, that there shall be deducted from such claim, the value of any salvage recovered from the wreck by the assured."

under the terms of the contract. In addition to this sum, PMI had incurred an additional $17,529.98 in expenses for wreck removal. PMI was able to recover $127,557 from the sale of the salvaged PM II, yielding a net recovery of $125,977 after deduction of expenses connected with the sale. Accordingly, after deducting these sums, and the $10,000 policy deductible, PMI made demand on Insurer in the total amount of $641,522.98 plus interest and attorneys' fees. This demand was refused by Insurer, although, for purposes of this litigation, Insurer has agreed that the expenses incurred were reasonable.

There is no question that PMI fit the bill of the "prudent company" in removing the PM II. At the time of these activities, hurricane season was approaching and the submerged barge posed a threat to neighboring oil production facilities and workers. In addition, the PM II, once it had settled, lay only eight feet below the surface of the water and posed a threat to navigation in the area, as PMI was clearly informed by the Coast Guard.[3] Nevertheless, Insurer argues that the removal, although perhaps compelled by prudence, was not "compulsory by law" as required by the express terms of the policy. The District Court agreed with Insurer and denied recovery by PMI. This appeal followed.

Compulsory By Law? A Judicial Sounding

The primary tasks before this Court—the successful resolution of which paves the way for the ultimate

3. Four days after the sinking of the PM II, the United States Coast Guard cabled PMI advising that the wreck constituted a hazard to navigation and instructing PMI to properly mark the wreck. *Progress Marine,* 1979 AMC at 71.

decision of the whole case—does not, at first blush, appear to be of Herculean proportions. We are simply asked to determine the meaning of the words "compulsory by law" as they are employed in the P&I policy which Insurer issued and PMI purchased. As simple as this task may initially appear, however, it is probably safe to say that the parties, and the courts, have already devoted more time and effort in resolving the meaning of these three words than was required in the cleaning of all the Augean stables.

At the outset, we emphasize that whether we employ California law, as PMI suggests may be required by *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337, 1955 A.M.C. 467 (1955),[4] or some other law is not particularly material to the resolution of this issue since there is no indication that land-based insurance principles concerning the construction of insurance policies vary significantly from marine principles. See *Calcasieu-Marine Nat. Bank, Etc. v. Am. Emp. Ins.*, 533 F.2d 290, 295 (5th Cir. 1976). A review of some of these principles provides us with buoys for interpreting this policy.

In *Calcasieu-Marine* this Court recognized these general principles:

> [W]ords are to be construed in their plain, ordinary, and popular sense. [Citations omitted]. This rule is varied from only if a word is used as a 'term of art',

4. The insurance policy was apparently issued in California. The parties themselves do not consider the choice of law question to be a significant issue in this case. To the extent that *Wilburn Boat* does require the application of California law, we find the general principles of construction which we rely on in this case to be consistent with the law of that state.

> in which case its meaning in the area for which it is a term of art is applied.

Id., 533 F.2d at 295-96.

This Court further reiterated in *Walter v. Marine Office of America*, 537 F.2d 89, 95, 1977 A.M.C. 1471, 1477-78 (5th Cir. 1976) what we had many times pronounced:

> Considering that a reviewing Court should view a contract in the light of the setting of the parties and the reasonable expectations as to risks and protection against them, an insurance policy should be construed in such a way as to effectuate its purpose.

Finally, it is a well established insurance law principle that the "insurance policy if uncertain in meaning should be construed against the insurer who wrote it and should be read literally so as to indemnify the insured." *Id.*, 537 F.2d at 94-95, 1977 A.M.C. at 1477; see also *Calcasieu-Marine*, 533 F.2d at 295.

This Court has never had occasion to address the precise questions raised by this case. Prior to launching into an independent analysis of the meaning of the term "compulsory by law", however, we deem it appropriate to briefly discuss decisions of other courts on this point.

The Second Circuit has authored an opinion as to the purport of a policy insuring against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory." This is certainly a close cousin of the policy in our case, if not an identical twin. In *Seaboard Shipping Corporation v. Jocharanne Tugboat Corporation*, 461 F.2d 500, 504, 1972 A.M.C. 2151, 2154 (2d Cir. 1972) that Court declared in awesome terms:

> '[C]ompulsory removal' is a term of art in admiralty law and refers to a situation in which a hull has been abandoned by the owner and the hull underwriter but, *pursuant to government order,* must be removed from navigable waters. Under those circumstances, the P&I underwriter, absorbing costs which no one else remains liable to pay, must remove the wreck or reimburse the government for removal. (Emphasis added).

District Courts in our own Circuit are evidently split in their interpretation of the meaning of removal "compulsory by law" in a marine insurance policy. The District Court in the instant case, although not citing *Jocharanne,* made findings seemingly consistent with the Second Circuit opinion. While stating that Insurer admitted that under the circumstances the wreck removal was prudent, and that the capsized PM II constituted a hazard to navigation, the District Court in concluding that the removal was not "compulsory by law", found that "at no time prior to its actual removal by plaintiff, did the United States Corps of Engineers, any other governmental body, or any court of competent jurisdiction order plaintiff to remove" the wreck. 1979 A.M.C. at 72-73. The Court further found that no governmental body had authority to order removal of the wreck. *Id.* at 73.

In a more recent opinion, another District Court in this Circuit reached a conclusion apparently at odds with *Jocharanne* and the District Court opinion in this case. In *Continental Oil Co. v. Bonanza Corporation,* ____ A.M.C.____ (S.D. Tex. 1980) [H-78-944, Aug. 25, 1980], the charterer of a vessel, which sank alongside an offshore rig, removed the wreck and then sought reimbursement from the insurer. In permitting direct action

against, and ultimately recovery from, the insurer, Judge Cire found:

> The policy contains a provision requiring the payment of wreck removal expenses, as here, when such removal is compulsory by law. [Insurer] points to the decisions of [*Jocharanne*] and [*Progress Marine*] as standing for the proposition that removal is "compulsory by law' only where written demand has been made by a governmental authority. But such a restrictive interpretation of the language is unjustified.

Although the Court in *Bonanza* did not articulate an interpretation as to the precise meaning of the term "compulsory by law", the Court clearly backed away from the notion that removal must be made pursuant to direct governmental order in order to warrant recovery.

As discussed previously, were we to conclude, as *Jocharanne* clearly suggests, that "compulsory by law" is a term of art in the marine insurance business, our initial inquiry would be at an end. We would simply apply the term of art meaning and conclude, as the Second Circuit stated, that removal must be specifically ordered by a governmental body to warrant coverage. Although we incline strongly to agree with PMI that the quoted section of the *Jocharanne* opinion which discusses compulsory removal is mere dicta,[5] we are unable simply to ignore the fairly unequivocal pronouncement by a distinguished Court so experienced in dealing with marine insurance.

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5. The vessel in *Jocharanne* was removed as part of "sue and labor" activities. The vessel owner never attempted abandonment but rather had the vessel removed for the sole purpose of salvaging the hull. The "compulsory removal" provision of the insurance policy, therefore, never came into play. 461 F.2d at 504, 1972 A.M.C. at 2154.

However, upon independent examination of the authorities cited in *Jocharanne*[6] we are unable to agree with that Court that removal "compulsory by law" requires a peremptory order by an authoritative governmental agency.

Stripped of reliance on "compulsory by law" imposed by widely accepted maritime law as a term of art we must, as previously discussed, try to construe these words in their "plain, ordinary, and popular sense." *Calcasieu-Marine*, 523 F.2d at 295-96. Although these three words in and of themselves do not appear particularly inscrutable, in the lexicon of marine insurance we find resort to the dictionary to be useful, and find Black's Law Dictionary (4th ed.) particularly helpful.

Taking first the word "compulsory" *Black's* provides the following definition:

> Involuntary; forced; coerced by legal process or by force of statute.

For the word "by" *Black's* provides the following definition:

> In consequence of . . . through the means, act, agency or instrumentality of.

Finally, *Black's* defines "law" as:

> That which is laid down, ordained, or established. A rule or method according to which phenomena

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6. At 461 F.2d at 504, 1972 A.M.C. at 2154, appears the following citation of authorities:
See the Wreck Removal Act, 33 U.S.C. §§ 409-414; Dover, A Handbook to Marine Insurance (6th ed. 1964) at 439. *Cf. Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967).

> or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences, is a 'law'.

Viewing these three words together as a phrase, it seems evident that "compulsory by law" in the context of this insurance policy should not be viewed as restricted to situations in which an express direct order from a governmental body directs removal. Clearly, for example, removal occasioned to avoid a violation of a criminal statute subject to criminal sanctions, although not specifically ordered by governmental authority, would nevertheless be compelled by law. On the other hand we are not prepared to say that removal occasioned by *any* "legal obligation" is "compulsory by law", as PMI would seem to suggest.[7]

---

7. As authority for the proposition that removal "compulsory by law" connotes any removal performed pursuant to a "legal obligation" PMI refers us to L. Buglass, Marine Insurance and General Average in the United States (1973), pp. 64-65:

> Protection and Indemnity underwriters do cover wreck removal expenses but it must be emphasized that, absent any specific agreement to the contrary, underwriters insuring wreck removal expenses are only liable if their assured is *legally liable* for removing the wreck. Under such Protection and Indemnity coverage the assured usually remains protected and indemnified for as long as he has a possible liability. Thus, if the insured vessel sinks as a result of the original accident and the wreck cannot be located but resurfaces at a later date, any *legal liability* falling on the assured to remove the wreck is covered by the original insurance. (Emphasis the author's).

While Buglass may correctly state a general proposition concerning insurance for wreck removal, we are disinclined to rely on this authority in resolving the present controversy. It is certainly arguable that the inclusion of the words "compulsory by law" in the insurance policy before us was reasonably intended, and reasonably understood, to restrict recovery to cases where something more than simple exposure to "legal liability" exists.

Soundings Reveal: Risk Evaluation

As stated in *Walter*, 537 F.2d at 95, 1977 A.M.C. at 1477-78, in construing an insurance policy reference must be made to the reasonable expectations of the parties as to the risks and protection against them. As applied to this case, removal occasioned by an unarticulated or unreasonable apprehension of criminal or civil liability could not be considered "compelled by law". On the other hand, where removal was reasonably required by law, or where failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered "compelled by law" for purposes of recovery. However, an additional inquiry must be made as to whether the removal was in fact "compelled by law," that is, whether removal was performed as a result of a subjective belief on the part of the insured that such was reasonably necessary to avoid legal consequences of the type contemplated by this policy.[8]

While we do not pass final judgment on this case, nor make a forecast as to the ultimate judgment of the District Court on remand, we believe that on the facts presently before the Court it at least cannot be said that no possibility for recovery by PMI exists under the legal standard which we have announced. Certainly, for example, potential exposure to PMI resulting from its wreck

8. This "objective" and "subjective" inquiry which we deem appropriate in this case is akin to the dual inquiry as to the availability of "good faith" immunity in certain actions under 42 U.S.C. § 1983. *Cf. Wood v. Strickland*, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); *Dilmore v. Stubbs*, 636 F.2d 966 (5th Cir. 1981); *Bryan v. Jones*, 530 F.2d 1210, 1214 (5th Cir.) (En Banc), *cert. denied*, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976).

rupturing an oil pipeline or breaching the hull of an oil carrying vessel could have been enormous. Although we do not undertake to address the reasonable probabilities of the occurrence of these or similar casualties, we nevertheless raise here several points of liability which such casualties could have engendered.

We note that at the time of the sinking of the PM II, the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1321,[9] prohibited the discharge of oil into or upon waters adjoining the United States at least within twelve miles from shore.[10] This Act expressly provided for third party liability to the United States Government, in certain circumstances, for oil spill removal costs. *Id.*, at § 1321(g). Furthermore, PMI would have been without resort to any available limitation if it could have been shown that the oil discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of [PMI]." *Id.* We raise, without addressing, the potential relevance of the fact that legislation enacted after the 1975 sinking of the PM II imposes increased statutory liability for oil spills. See, e.g., the Clean Water Act of 1977, 33 U.S.C. § 1321.

In addition to this statutory liability to the United States, in the event of a major oil spill caused by its negligence PMI also could have potentially faced enor-

9. The FWPCA has been amended by the Clean Water Act of 1977, 33 U.S.C. § 1321. The complete text of the FWPCA may be found in 3 Benedict on Admiralty (7th ed. 1975), 9-23-9-40.3.

10. The actual language of the Act proscribes discharge of oil into or upon "waters of the contiguous zone." 33 U.S.C. § 1321 (b)(1). The contiguous zone was contemplated as extending 12 miles from the coast of the United States. See § 1321(a)(9) together with 37 Fed. Reg. 11906 (1972); see also 3 *Benedict on Admiralty* at 9-11, n.10.

mous damages under private actions for pollution damage. For these claims, even if PMI could have established that the PM II was a "vessel" entitling PMI to limitation under the Limitation of Liability Act of 1851, 46 U.S.C. §§ 181 *et seq.*, it is quite possible that PMI still could not have successfully invoked limitation for the sinking of the PM II. And in any event, its liability in these possible risk situations would have been for failure to remove the wreck which might constitute personal fault within the privity and knowledge of the owner. See, e.g., *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 448, 1977 A.M.C. 2607, 2618-19, and cases discussed in n.13 (5th Cir. 1977).

Hauling The Dispute Back To Port

Since the District Court's opinion was rendered in the light of an interpretation of the controlling language in the insurance policy which was erroneous, we cannot credit the findings of the Court as presently made. See *Kirksey v. City of Jackson, Mississippi*, 625 F.2d 21, 21-22 (5th Cir. 1980); *NLRB v. Alterman Transport Lines*, 587 F.2d 212, 220 (5th Cir. 1979); *Theriault v. Silber*, 547 F.2d 1279, 1280 (5th Cir.), *cert. denied*, 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977); *Costello v. Lipsitz*, 547 F.2d 1267, 1276-77 (5th Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88 (1977). We similarly do not pass on the Court's legal finding that no governmental authority was empowered to order removal of the wreck of the PM II sunk 11 miles off the Louisiana coast since this finding, even if true, is not necessarily dispositive of the case. We reiterate that by our observations concerning potential

liability to PMI for failure to remove the wreck we make no intimations as to the ultimate disposition of this case. We remand this action in full to the District Court to make the dual inquiry described in this opinion, leaving initially to the parties and the District Court to determine the extent to which the present record should or need be supplemented.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 76-H-121

PROGRESS MARINE, INC.

v.

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

This is a suit for reimbursement of wreck removal expenses allegedly due under a policy of marine protection and indemnity insurance covering, among other vessels, the Jackup Workover Barge PMI II, which policy was in effect at the time of a casualty involving the capsizing and sinking of said barge in the Gulf of Mexico approximately eleven (11) nautical miles off the coast of Louisiana in waters with an approximate depth of fifty-six (56) feet and in the vicinity of producing platforms, pipelines and other marine offshore properties and in an area frequently navigated by many vessels including those servicing said properties. Prior to its removal, the capsized PMI II lay in the vicinity of production platforms, pipelines and other marine offshore properties. The defendant, Foremost Insurance Company, admits that under the circumstances its removal was prudent but uninsured.

FINDINGS OF FACT

I.

Plaintiff, Progress Marine, Inc., was at all times material and now is a corporation duly organized and existing under the laws of the State of Texas, having its principal office and place of business in Houston, Texas. At all times material, plaintiff was the demise character (under a financing arrangement) and operator of the Jackup Workover Barge PMI II, a steel jackup workover rig. Said vessel consisted of two barges one over the other, the lower barge of which was called the "mat" of the rig and which served as a base of the rig when same was jacked-down and operating. The dimensions of the mat were seventy-eight (78) feet wide by seventy-eight (78) feet long by four (4) feet deep, and the mat was connected to the upper hull (dimensions 50 feet wide by 96 feet long by 10 feet deep) by four (4) legs (48 in. in diameter by 122 feet in length) on which the main hull could be jacked-up or down by hydraulic pumps.

II.

The Barge PMI II, while in tow by the Tug Admiral Lee on June 1, 1975, in daylight in calm water, capsized and sank in the Gulf of Mexico in about fifty-six (56) feet of water approximately eleven (11) nautical miles from the Louisiana coast as a result of negligence on the part of the Tool Pusher of the PMI II, and of her Barge Captain and thus as a result of the vicarious negligence of Progress Marine, Inc., their employer and the operator of said barge.

III.

On June 5, 1975, the United States Coast Guard cabled plaintiff advising that the wreck constituted a hazard to

navigation and instructed plaintiff to properly mark same by day and by night. At that time, and all times following the capsizing and sinking, the PMI II lay in a sunken position approximately 500 yards in a southerly direction from a manned Shell Oil Company production platform and 100 yards southeastward of an Exxon pipeline company 10-inch high-pressure pipeline. There were other offshore platforms, pipelines and offshore development properties in that vicinity. There is substantial navigation in the area. Furthermore, the hurricane season was beginning in the Gulf of Mexico.

IV.

Plaintiff and the Barge PMI II were covered by the policy of protection and indemnity insurance (Exhibit A to Plaintiff's Original Complaint), which was issued by defendant in San Francisco, California, on September 19, 1974, on a standard printed form (designation "SP-38") with various riders and endorsements and without any negotiation as to the specific terms set forth in the policy form. Plaintiff relies on lines 19-21 of the said protection and indemnity policy which read as follows:

> "Costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein where such removal is compulsory by law, provided however, that there shall be deducted from such claim the value of any salvage recovered from the wreck by the assured."

V.

Following the casualty of June 1, 1975, aforesaid, plaintiff took steps to save the lives of five people trapped below the surface of the water in the main barge, which

operations were successful. Thereafter, plaintiff unsuccessfully attempted to salvage the barge which latter activities plaintiff claims were unsuccessful. Subsequently, plaintiff on or about June 10, 1975, attempted to abandon the wreck to hull underwriters, which abandonment was rejected. On or about June 10, 1975, plaintiff gave notice to defendant of the existence of the capsizing of the PMI II.

VI.

Subsequently, on or about June 20, 1975, after soliciting bids for removal of the wreck, plaintiff entered into a "no cure-no pay" contract with Sun Salvage, Inc., to remove the wreck to Morgan City, Louisiana. Said contract was negotiated through the salvage master on this occasion, Captain Al Veverica, who received a portion of the contract proceeds for his services herein.

VII.

Pursuant to the aforesaid contract, on or about August 21, 1975, following removal operations of an excess of sixty (60) days, all of the wreckage of the PMI II had been brought by the contractor to Morgan City, Louisiana, as required by the contract. Thereafter, the wreckage of the barge was sold to the highest bidder, proceeds of the sale being $127,557.00 less $1,580.00 representing reasonable expenses connected with the sale.

VIII.

The "no cure-no pay" contract having been performed as aforesaid, plaintiff became liable to pay and did pay to the successful contractors $760,000.00, the contract price under said contract.

IX.

In addition to the $760,000.00 paid as the contract price aforesaid, plaintiff incurred additional costs and expenses from wreck removal amounting to the sum of $17,529.98, which it also paid. These additional expenses were necessary and reasonable expenses of wreck removal.

X.

The capsized PMI II constituted a hazard to navigation. However, at no time prior to its actual removal by plaintiff, did the United States Corps of Engineers, any other governmental body, or any court of competent jurisdiction order plaintiff to remove same.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter under Title 28 U.S.C.A. § 1333.

II.

This Court finds that the *Rivers and Harbor Act*, 33 U.S.C.A. § 409 does not extend to the situs of the wreck of the PMI II since the Corps of Engineers removal authority thereunder is confined to vessels or other craft ". . . wrecked and sunk in a navigable channel . . ."

The term "navigable channel" is confined to an inland waterway locale. The wreck situs of the PMI II having been found to be some eleven (11) nautical miles off the coast of Louisiana, in the open and unrestricted waters of the Gulf of Mexico, it was not in a "navigable channel" within the meaning of the *Rivers and Harbor Act*, § 409.

III.

This Court further finds that the coverage of the *Rivers and Harbor Act*, § 409 is not extended by the *Outer Continental Shelf Lands Act* § 1333 so as to give the Secretary of the Army authority to compel removal of a wreck eleven (11) nautical miles off the Louisiana coast in the open and unrestricted waters of the Gulf of Mexico. The *Outer Continental Shelf Lands Act* § 1333 neither expressly nor impliedly deals with wreck removal.

IV.

Under the circumstances of this case, plaintiff was not compelled by law to remove the wreck.

V.

Plaintiff therefore takes nothing by its suit.

VI.

In the event that any of the foregoing Findings of Fact also constitute Conclusions of Law, they are also adopted as Conclusions of Law. In the event that any of the foregoing Conclusions of Law also constitute Findings of Fact, they are also adopted as Findings of Fact.

Defendant will prepare a draft of judgment for signature by the Court.

Signed at Houston, Texas, this 10th day of May, 1978.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. 76-H-121

PROGRESS MARINE, INC.

v.

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN

FINAL DECREE

Upon consideration of the evidence introduced at the trial of this cause, arguments of counsel and trial briefs and upon the findings and conclusions incorporated in the Findings of Fact and Conclusions of Law entered on the 10th day of May, 1978, the Court finds that the costs or expenses of, or incidental to, the removal of the wreck of the Drilling Barge PMI II incurred by the Plaintiff as owner or owner pro hac vice of the said vessel, were not insured by the Defendant since the removal of the wreck of the said vessel was not "compulsory by law." The applicable policy of insurance only insured those expenses when the removal of the wreck of the insured vessel was "compulsory by law." It is, therefore

ORDERED, ADJUDGED and DECREED that the Plaintiff do have and recover nothing of and from the Defendant herein and that its Complaint on file be and the same hereby is dismissed with prejudice with all costs of Court to be paid by the said Plaintiff.

All further relief sought herein which is not expressly granted is denied.

SIGNED this the 23rd day of May, 1978, at Houston, Texas.

/s/ ROBERT O'CONOR, JR.
United States District Judge

APPENDIX "B"

SEABOARD SHIPPING CORPORATION,
Plaintiff,

v.

JOCHARANNE TUGBOAT CORPORATION
et al., Defendants,

and

Oceanus Mutual Underwriting Association, Ltd.,
Defendant-Appellant,

v.

G. I. SIBRING and all other Underwriters at Lloyd's Subscribing Policy of Insurance 64/60630 and Edinburgh Assurance Co., Limited and all other Institutes of London Underwriters Companies Subscribing Policy of Insurance No. 60630, Defendants and Cross-Claimants-Appellees.

No. 616, Docket 71-2183.

United States Court of Appeals,
Second Circuit.

Argued April 10, 1972.

Decided May 25, 1972.

Action against tugboat corporation to recover for rental of barge and tug to off-load gasoline from corporation's barge following her grounding, in which plaintiff served an amended complaint against three underwriters, one of

which cross-complained against the others to recover for sum expended in defense and settlement of third-party litigation instituted by salvors. From an order of the United States District Court, Southern District of New York, Dudley B. Bonsal, J., 334 F.Supp. 1112, one of the underwriters appealed. The Court of Appeals, J. Joseph Smith, Circuit Judge, held, inter alia, that where insurer of hull and machinery and barge owner, far from abandoning their interests in grounded vessel, had it towed to New York in vain hope of salvaging the hull, and no governmental order was necessary to spur the removal, the costs of operation were not chargeable to insurer under protection and indemnity policy which insured against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory."

Reversed and cross claim ordered dismissed.

Before FRIENDLY, Chief Judge, and SMITH and OAKES, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge:

Interpretation of the hoary and often poetic provisions of two marine insurance policies is necessitated by this appeal by Oceanus Mutual Underwriting Association, Ltd. (Oceanus) from a judgment of the United States District Court for the Southern District of New York (Dudley B. Bonsal, Judge) requiring the company to

contribute a portion of a sum expended by Lloyd's of London to remove from its grounding a stranded and damaged barge insured by both parties. The court found that the salving operation redounded to the benefit of all three of the vessel's insurers and ordered each to reimburse Lloyd's for one-third of the costs. Oceanus appeals, and we reverse that portion of the lower court's order which held it liable to Lloyd's.

On June 16, 1964, the VAL 51, a barge owned by the Jocharanne Tugboat Corporation (Jocharanne), carrying 50,000 barrels of gasoline, went aground in Lake Ontario, immediately offshore Oswego, New York, and began leaking gasoline into the water and onto the adjacent shoreline. Notified of the grounding and of the possibility of explosion of the vessel, the Salvage Association of London appointed an independent surveyor, Mr. Paul J. Ranahan, to survey the casualty and proceed with salvage operations. Though Mr. Ranahan testified that he was acting on behalf of "all concerned underwriters," Lloyd's was the insurer actively involved in the project, and Oceanus was not notified of the incident until completion of the salvage work. Seaboard Shipping Corporation (Seaboard) was hired to offload the usable gasoline cargo remaining on the barge; Sequin Salvage Company was employed to refloat and work on the hull, which continued to present an explosion hazard. The ship was made ready for towing by June 29, and arrived in New York City, where it was declared a constructive loss, on July 4, 1964.[1]

1. Mr. Ranahan urged that the vessel be towed to Kingston, Ontario, directly across the lake, but Jocharanne, apparently intent on trying to save the hull, insisted on New York. The portion of the

In November, 1965, Seaboard instituted this action against Jocharanne to collect the $7,800 owed for Seaboard's services in offloading the gasoline from the VAL 51. Seaboard obtained a default judgment against the insolvent Jocharanne and, after Jocharanne had tendered the policies on the vessel to the court, Seaboard was permitted to amend its complaint to name the insurers as defendants. At the time of the accident, Jocharanne had three policies covering the barge: a $200,000 Hull and Machinery policy issued by Lloyd's of London, an $80,000 Open Cargo Legal Liability policy issued by Phoenix Assurance Company of New York (Phoenix), and a $200,000 Protection and Indemnity (P & I) policy issued by appellant Oceanus. The coverage of the three policies was not redundant, as Lloyd's insured for damage to the hull and machinery of the vessel; Phoenix was liable for loss or damage to the cargo; and Oceanus was responsible for personal injury, loss of life, damage to docks, piers, etc., and certain other extraordinary expenses.[2]

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total cost due to the unnecessary length of the voyage was charged solely to Lloyd's, the hull underwriter. Neither party objects to the allocation of this cost.

2. The Oceanus policy is a representative protection and indemnity agreement; the historical roots of this variety of marine insurance explain certain of its unique characteristics. The policies were first issued by clubs of shipowners to insure against risks for which they could not obtain commercial coverage; therefore, classically and in this Oceanus policy, claims for any loss, damage, or liability which could be covered or would be payable under the standard form of hull policy are excepted from the P & I policy. Clause 2, Oceanus policy (42a); Landry v. Steamship Mutual Underwriting Association, 177 F.Supp. 142 (D.Mass. 1959), aff'd 281 F.2d 482 (1st Cir. 1960); Arnould on Marine Insurance (14th ed.), paragraphs 129-134. The risks covered by the policy are therefore a somewhat miscellaneous group of "left-overs," including those caused by rare and catastrophic occurrences such as plague, as well as those posed by more mundane difficulties.

[1] In its answer to the amended complaint, Lloyd's cross-claimed against Oceanus and Phoenix to recover part of the $83,000 Lloyd's had paid in settlement of state court actions brought by Sequin and other local salvors for labor and materials used to remove the VAL 51 and its cargo. The Seaboard claim was settled before trial; the only remaining issue was the liability as between the insurers for the state court settlement costs.[3]

[2] These expenses, for removal of cargo and barge, are known in maritime insurance circles as "sue and labor" expenses; they are sums spent by the insured or its representative in an effort to mitigate damage and loss once an accident has occurred; and the insurance company pays them even where, as in this case, the ship is ultimately declared a total loss, in order to encourage diligence in the prevention of excessive liability or loss. See Gilmore and Black, The Law of Admiralty (1957), pp. 64-69; Home Ins. Co. v. Ciconett, 179 F.2d 892 (6th Cir. 1950); White Star SS Co. v. North British and Mercantile Ins. Co., 48 F.Supp. 808, 812 (E.D. Mich. 1943). The Lloyd's and Phoenix policies contained a "sue and labor" clause; that of Oceanus did not.

The court below found that the leaking and damaged condition of the ship threatened the separate and distinct interest of each insurer and that Jocharanne, in incurring

3. It is important to distinguish this situation from that in which several insurers of the same risk are involved. In that instance, when losses are suffered or sue and labor expenses incurred, all contribute ratably to the payment. Great West Casualty Co. v. Truck Ins. Exchange, 358 F.2d 883 (10th Cir. 1966); American Dredging Co. v. Federal Ins. Co., 309 F.Supp. 425 (S.D. N.Y. 1970); Milan v. Providence Washington Ins. Co., 227 F.Supp. 251 (E.D. La. 1964). In this case, different risks were insured against by the three policies and the equitable doctrine of contribution between co-insurers of the same risk does not apply.

towing and removal charges, was seeking to protect the hull, save the cargo, and prevent explosion and resultant disaster.[4] The terms of the Lloyd's and Phoenix policies which authorize sue and labor efforts to protect the hull and cargo in case of accident were held the source of those underwriters' responsibility. The basis for Oceanus' obligation to reimburse Lloyd's was found in a term of the Oceanus policy which insures against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory." It is not clear whether the court considered the salvors' charges "costs of raising the wreck" under the policy or preventive medicine which by forestalling explosion and sinking would relieve Oceanus of the future obligation to raise or remove the wreck.

[3, 4] If the court meant the former, Oceanus argues persuasively that the clause was not applicable to this situation. Lloyd's argues that the pressure from the Coast Guard and other governmental authorities in the Oswego area made the removal of the barge compulsory. But "compulsory removal" is a term of art in admiralty law and refers to a situation in which a hull has been abandoned by the owner and the hull underwriter but, pursuant to government order, must be removed from navigable waters. Under those circumstances, the P & I underwriter, absorbing costs which no one else remains liable to pay, must remove the wreck or reimburse the government for removal. *See* the Wreck Removal Act,

4. The district court found that Jocharanne was suing and laboring on behalf of all three insurers. It seems strange that, even if all the policies covered the expenses incurred, no effort was made to notify Oceanus during the 20-day salvage and towing period. In light of our disposition, we do not find it necessary to decide what effect the failure to notify might have if Oceanus' policy were construed to cover a portion of those expenses.

33 U.S.C. §§ 409-414; Dover, A Handbook to Marine Insurance (6th ed. 1964) at 439. *Cf.* Wyandotte Transportation Co. v. United States, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967). There was no "compulsory removal" of the VAL 51. Lloyd's and Jocharanne, far from abandoning their interest in the vessel, had it towed to New York in the vain hope of salvaging the hull. No governmental order was necessary to spur the removal and the costs of the operation were therefore not chargeable to Oceanus as removal costs under its policy.[5]

[5] The other possibility is that the benefit the lower court found Oceanus had received from the sue and labor efforts was the avoidance of explosion and potential liability for injury to persons and damage to docks or piers

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5. Further, any attempt to place liability on Oceanus on the basis of its "wreck removal" clause 1(g) would have to withstand the language of that clause providing that Oceanus "is not liable for such costs, or expenses as would be covered by full insurance under the standard form of policy on hull, machinery, etc., issued by the American Marine Insurance Syndicate. [Identical in all material respects to Lloyd's policy.]

Moreover, Oceanus claims that even were this a wreck removal for which it might be liable, if was obligated under its policy to indemnify Jocharanne only when the latter "shall have in fact paid" the costs of removal. Stuyvesant Ins. Co. of New York v. Nardelli, 286 F.2d 600 (5th Cir. 1961); Burke v. London Guarantee & Accident Co., 47 Misc. 171, 93 N.Y.S. 652 (Sup. Ct. 1905), aff'd 126 App. Div. 933, 110 N.Y.S. 1124 (1908). aff'd 199 N.Y. 557, 93 N.E. 1117 (1910). This court recently held that this condition is fulfilled when the judgment against the insured is satisfied in some fashion and the loss has been sustained (Liman v. American Steamship Owners Mutual Protection & Indemnity Association, 299 F.Supp. 106 (S.D. N.Y.), aff'd 417 F.2d 627 (2d Cir. 1969), cert. denied, 397 U.S. 936, 90 S.Ct. 946, 25 L.Ed.2d 116 (1970) but Oceanus claims that despite this liberalization, there must at least have been a judgment against the insured and the action for reimbursement must have been brought in its name. We need not determine whether these conditions on indemnification existed or were met here.

as well as for wreck removal. Oceanus admits that had such a disaster occurred, it might have been liable for substantial amounts, but it claims that any calculation based on that possibility is extremely hypothetical and insists that the terms of its policy preclude holding it for any part of the expenses even if they tended to lessen the chance of explosion. Although we appreciate the motives of the district court in apportioning the costs, we are constrained to conclude that Oceanus is correct.

First we note that despite Lloyd's rhetoric, none of the expenses was incurred solely to avert those occurrences or protect those interests for which Oceanus alone was liable. All the costs were essential to any attempt to save the hull and cargo, so any benefit to Oceanus was in a sense incidental. More important, clause 2 of the Oceanus policy excepts from coverage "claims for any loss, damage, liability, or expense which would be payable under the present standard form of policy of the American Marine Insurance Syndicate on hull and machinery [identical in all essential respects to the Lloyd's policy] . . . and sufficient in amount to pay such loss, damage, liability or expense in full." As sue and labor expenses are covered by hull policies, they normally would not be recovered from the P & I policy underwriter. United States v. American Ins. Co. of Newark, N. J., 89 F.2d 8 (2d Cir. 1937); Landry v. Steamship Mutual, *supra.*

[6, 7] Despite the lack of coverage under the Oceanus policy, one might under these circumstances consider applying equitable principles and hold those who benefited from the services rendered for a portion of their cost, under a theory of equitable contribution or restitution. *See* Restatement of Restitution § 115. Within certain

limits, courts sitting in admiralty are free to apply these equitable rules. *See* Gilmore and Black, pp. 37-39; Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950). Whether such principles could and ought to be applied here, however, is rendered academic by the presence of a contractual provision on this very point, which states that "[w]here the Assured is, irrespective of this Association, insured or deemed to be insured against any loss or claim which would otherwise have been paid by the Association, there shall be no contribution by the Association on the basis of double insurance or otherwise." Clause 5, Oceanus policy. It is clear that in the absence of Oceanus Lloyd's would have been liable for the whole of the salvage expense, at least until the hull was abandoned in New York. Therefore, as these "escape" or "no-contribution" clauses have repeatedly been held valid and legal.[6] Oceanus has successfully contracted out of liability for contribution, under any theory, to a sum paid by another insurer, even though Oceanus might have otherwise been liable for that sum. Although this term, permitting Oceanus to reap benefits at no expense, seems somewhat odd, the intent that P & I inurance apply mainly or exclusively in situations to which no other coverage extends and the fact that Lloyd's has spent no more than it would have had there been no Oceanus policy mitigate the seeming harshness of the clause.

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6. United States Fire Ins. Co. v. Gulf States Marine & Mining Co., 262 F.2d 565 (5th Cir. 1959); Hartford Accident & Indemnity Co. v. American Employers Ins. Co. of Boston, Mass., 200 F.2d 5 (7th Cir. 1952); Penn v. National Union Indemnity Co., 68 F.2d 567 (5th Cir. 1934); Marine Transit Corp. v. Northwestern Fire and Marine Ins. Co., 67 F.2d 544 (2d Cir. 1933).

[8] Concluding as we do that the cross-claim against Oceanus must be dismissed, we need not reach the question of the district court's use of the pre-trial settlement with Seaboard, except to note that the use of such settlements to establish liability is forbidden as a matter of sound judicial policy. McCormack on Evidence, § 251; Hawthorne v. Eckerson Co., 77 F.2d 844 (2d Cir. 1935); Winkler-Koch Engineering Co. v. Universal Oil Products Co., 79 F.Supp. 1013 (S.D.N.Y. 1947).

Judgment against Oceanus reversed and cross-claim ordered dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-944

CONTINENTAL OIL COMPANY

v.

BONANZA CORPORATION and
REPUBLIC INSURANCE COMPANY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an admiralty and maritime action under Rule 9(h) of the Federal Rules of Civil Procedure and was tried to the Court without a jury. The Plaintiff has filed suit against the owners and insurers of the M/V AQUA SAFARI to recover damages incurred following the sinking of the AQUA SAFARI on January 1, 1977.

After hearing the testimony, reviewing the stipulations and pleadings and weighing all of the evidence, the Court makes the following:

Findings of Fact

1.

On December 28, 1976, a charter party was entered into between Continental Oil Company ("CONOCO") and the Bonanza Corporation ("Bonanza") to provide the vessel AQUA SAFARI as a standby vessel for offshore oil exploration activities carried on by CONOCO.

2.

Under the charter, Bonanza was required to maintain marine hull and machinery and protection and indemnity insurance coverage. The insurance was to name CONOCO as an additional assured under the policies and waive subrogation rights against CONOCO.

3.

On December 27, 1976, an insurance binder was issued setting forth the existence of the insurance policies and subsequently Insurance Policy No. MI-6494 was issued by Republic Insurance Company ("Republic") insuring the AQUA SAFARI and naming CONOCO as an additional assured and waiving subrogation rights against CONOCO.

4.

Under the charter agreement with CONOCO, Bonanza had the AQUA SAFARI report to High Island Block 110, offshore Texas for work as a standby boat during drilling operations carried on by the Transworld Drilling Rig No. 64 and the Drill Tender ERNIE MILLER.

5.

On the morning of January 1, 1977, at 5:30 a.m., the AQUA SAFARI came to Transworld Rig 64 to pick up a mud log report to be transported to the ERNIE MILLER. Upon arrival at Transworld 64, the vessel was told to stand by for several minutes until the report could be brought down to it. The AQUA SAFARI then set anchor and drifted back on her anchor line, crossing the anchor line of the Transworld 64.

6.

When the AQUA SAFARI was advised to come alongside the drilling rig, she began to pick up her anchor. As the AQUA SAFARI pulled in her anchor rope, her crew lost control of the vessel. The captain and deckhand of the AQUA SAFARI were seen to run to the stern of the vessel and then to the wheelhouse.

7.

By the time the captain returned to the wheelhouse, the AQUA SAFARI had drifted underneath the Transworld 64, entangling her prop and radio antenna and bridle lines placed there. The master and deckhand of the AQUA SAFARI then abandoned the AQUA SAFARI and the vessel sank directly beneath the Transworld 64.

8.

Soon after the sinking of the AQUA SAFARI, the Transworld 64 completed the well at the location. Because of possible dangers in moving the drilling rig, demand was made by CONOCO on Bonanza to remove the wreck of the AQUA SAFARI. Both Bonanza and Republic refused to proceed with the removal of the AQUA SAFARI.

9.

In order to begin production of the completed wells at the site, CONOCO was required to bring in a fixed platform and place it on location. CONOCO contracted with Brown & Root to place the fixed structure on location.

10.

The presence of the AQUA SAFARI constituted a continuing hazard to the placement of the fixed structure and CONOCO therefore decided that the Brown & Root derrick barge previously mobilized to place the fixed structure on location would be the most reasonable means of removing the AQUA SAFARI from the location so that the wreck would not cause danger to any other structures or pipelines in the area.

11.

The total cost of the various surveying, diving and removal operations incurred by CONOCO in connection with the removal of the AQUA SAFARI totalled $109,-000.00.

12.

Republic alleged in its answer to the instant action that there had been a change of management of the vessel in violation of the terms of the policy issued by that defendant. Republic further alleged that under said policy, such a change of management would void policy coverage.

13.

But the Court finds from the testimony of Mr. Jim Fuller and Gary Freeman, and the documents introduced in conjunction with such testimony that at no time was there any change of management of the AQUA SAFARI. Although negotiations were entered into for the sale of the vessel to Mr. Gary Freeman, Mr. Fuller and Mr. Freeman make clear that the terms and conditions of the sale were never carried out by Mr. Freeman and the

contract, whether characterized as a lease-purchase agreement or otherwise, never came into being.

Conclusions of Law

1.

This suit comes under the admiralty and maritime jurisdiction of the Court. 28 U.S.C. § 1333; *Irwin v. Eagle Star Insurance Company*, 455 F.2d 827 (5th Cir. 1972).

2.

Where a vessel strikes a stationary object, there is a presumption of fault on the part of the moving vessel. *A. T. & T. v. Steuart Transportation Company*, 1978 AMC 1680 (D. Md. 1977); *Standard Dredging Co. v. The SS SYRA*, 290 F.Supp. 260 (D. Md. 1968). The Court finds that Bonanza has failed to overcome this presumption of fault on the part of the AQUA SAFARI in striking first the anchor line of the Transworld 64 and then coming into collision with the underside of the stationary drilling rig.

3.

The Court likewise finds that negligence on the part of Bonanza, its master and crew has been established by a preponderance of the evidence and the Court finds that the sole cause of the sinking of the AQUA SAFARI and all damages resulting as a consequence of the sinking were the fault of Bonanza.

4.

Argument was made by Republic that under the laws of the State of Texas, no action could proceed directly against it in this action. But the Court finds that there are a number of possible bases for the institution and continuance of this proceeding, not only against Bonanza but against Republic.

5.

CONOCO may proceed directly against Republic because of the privity of contract between CONOCO and Republic. The insurance policy issued by Republic named CONOCO as an assured, and it is well settled that as an additional assured, CONOCO has the same rights as any other assured under the policy. See generally *R. Keeton, Insurance Law* §§ 4.1(b)(c) and (d) (1971).

6.

Likewise, the Court finds that CONOCO would have standing to proceed directly against Republic because it was a third-party beneficiary to the contract of insurance between Republic and Bonanza. *Cumis Insurance Society, Inc. v. Republic National Bank*, 480 S.W.2d 762 (Tex. Civ. App.—Dallas, 1972). The policy of marine insurance was obtained pursuant to the requirements of the charter party between CONOCO and Bonanza, and it was for this reason that Republic sold the policy to Bonanza.

7.

The Court, having found that CONOCO may proceed directly against Republic, as well as Bonanza, holds that

under the policy of insurance issued by Republic, there is a basis for a finding of liability against Republic.

8.

The policy contains a provision requiring the payment of wreck removal expenses, as here, when such removal is compulsory by law. Republic points to the decisions of *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500 (2d Cir. 1972) and *Progress Marine, Inc. v. Foremost Insurance Co.*, 1979 AMC 70 (S.D. Tex. 1978), as standing for the proposition that removal is "compulsory by law" only where written demand has been made by governmental authority. But such a restrictive interpretation of the language is unjustified. *Heep L. Buglass, Marine Insurance and General Average in the U.S.* (1973), "Protection and indemnity underwriters do cover wreck removal expenses but it must be emphasized that, absent any specific agreement to the contrary, underwriters insuring wreck removal expenses are only liable if their assured is legally liable for removing the wreck." *Id.* at 64-65. See, also *E. R. Ivamy Marine Insurance*, (2d Edition 1974).

9.

The Court further finds that under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*, and the regulations issued thereunder, the removal of the AQUA SAFARI was compulsory by law. Both 43 C.F.R. § 3307.3-6 and the Lease Agreement required CONOCO to remove all equipment from the leased premises within one year after termination of the lease. And a crewboat has been held to be "equipment" used in oil well exploration. *Continental Casualty Co. v. Associated Pipe*

& Supply Co., 447 F.2d 1041 (5th Cir. 1971). Although the Court recognizes that the equipment removal provisions generally address themselves to removal *not later than* one year following termination of the lease, the earlier removal by CONOCO was prudent in order to mitigate damages and losses and to enable CONOCO to continue drilling and producing the lease. *Tennessee Valley Sand & Gravel Co. v. M/V DELTA*, 598 F.2d 930 (5th Cir. 1979).

10.

Under the provisions of the insurance policy, there is protection from liability for damages or expenses in connection with fixed or moveable objects or other property. The evidence reflected that CONOCO, as an additional assured, has reason to believe that it was exposed to potential liability for damage to other property in the area of the sinking. CONOCO could have been liable in its capacity as owner of the vessel. *Wedlock v. Gulf Mississippi Corp.*, 554 F.2d 240 (5th Cir. 1977). Under the terms of the policy, having expended money in connection with "movable objects or other property," CONOCO, as an assured under the policy, is entitled to recover its expenses from Republic.

11.

Because the Court finds that CONOCO has already, as an assured, spent money for the removal of the wreck, both under the wreck removal provisions and the damages or expenses in connection with "movable objects or other property" provisions in the policy, the argument by Republic that it need make no payment because the policy is one of indemnity is without merit.

12.

There is ample evidence that the cost to CONOCO for the removal of the AQUA SAFARI represented the reasonable salvage expenses. The use of the Brown & Root derrick barge already under contract was both prudent and appropriate. Accordingly, because the sinking of the AQUA SAFARI was the sole fault of Bonanza, judgment is rendered herein in favor of CONOCO and against Bonanza in the amount of $109,000.00. Judgment is also rendered in favor of CONOCO and against Republic, as insurer for Bonanza and CONOCO, for the reasons set forth above.

13.

The Court further finds that there are no peculiar circumstances here that would cause it to deviate from the general rule that prejudgment interest is to be allowed as a matter of course. For that reason, there shall be an award of such interest at the rate of 9% from the date of the sinking. *Mobil Oil Corp. v. Tug of Pensacola*, 472 F.2d 1175 (5th Cir. 1973); and *Southern Pacific Transportation Co. v. The Tug CAPTAIN VIC*, 443 F.Supp. 722 (E.D. La. 1977).

14.

Finally, the Court finds that there is no evidence to support the plea of limitation of liability raised by Bonanza in its answer. 46 U.S.C. § 183(a). It is well settled that the burden is on Bonanza to establish that it lacked privity or knowledge with respect to the events leading to liability herein. *Tug OCEAN QUEEN, Inc. v. Tanker FOUR LAKES*, 398 F.Supp. 1062 (S.D.N.Y.

1974). There was overwhelming evidence that the Master, Gary Freeman, was the managing agent of Bonanza with respect to affairs relating to the vessel. Indeed, the very charter with CONOCO in this matter had been executed on behalf of Bonanza by Gary Freeman. Gary Freeman was present on the AQUA SAFARI at the time of the casualty herein with full knowledge of the negligence of the vessel, including the failure of the crew, including himself, to maintain a proper lookout for the anchor line of the Transworld 64. Clearly, the negligence of the vessel and her crew was within the privity and knowledge of Bonanza and limitation will be denied. *States Steamship Company v. United States,* 259 F.2d 458 (9th Cir. 1958).

SIGNED and ENTERED this 25th day of August 1980.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-944

CONTINENTAL OIL COMPANY

v.

BONANZA CORPORATION and
REPUBLIC INSURANCE COMPANY

FINAL JUDGMENT

Upon consideration of the testimony and evidence in this case, and in accordance with the findings of fact and conclusions of law, it is hereby

ORDERED that judgment is for the plaintiff, Continental Oil Company, in the amount of $109,000.00 plus interest at the rate of nine (9) percent from January 1, 1977.

Costs of this action shall be taxed to defendants.

SIGNED and ENTERED this 25th day of August 1980.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

APPENDIX "C"

PROGRESS MARINE, INC.
Plaintiff-Appellant,

v.

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN,
Defendant-Appellee.

No. 78-2321.

United States Court of Appeals,
Fifth Circuit.

April 15, 1981.

Insured brought suit against insurer for expenses incurred in removing wreck of one of its barges. The United States District Court for the Southern District of Texas, at Houston, Robert O'Conor, Jr., J., denied claim, and insured appealed. The Court of Appeals, Brown, Circuit Judge, held that under protection and indemnity policy insuring against "* * * Costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law * * *," words "compulsory by law" were not restricted to situations in which express direct order from government body directed removal; rather where failure to remove would have reasonably exposed insured to liability imposed by law sufficiently great to justify expense of removal, such removal could be considered "compelled by law."

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, GEWIN and POLITZ, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Progress Marine, Inc. (PMI) appeals the District Court's[1] denial of its claim against Foremost Insurance Company (Insurer) for expenses incurred in removing the wreck of a Jackup Workover Barge (PM II) which sank some 11 miles off the Louisiana coast. PM II was covered by a marine P&I insurance policy which provided recovery for wreck removal expenses when "such removal is compulsory by law." Because we find that the District Court erred in its interpretation of the term "compulsory by law", and accordingly applied an improper legal standard in the resolution of this case, we vacate and remand.

Eight Fathoms Of Barge In Nine Fathoms Of Water

The essential facts of this case are not in dispute. On the afternoon of June 1, 1975, PMI's Jackup Workover Barge PM II capsized and sank, while being towed, in approximately 56 feet of water some 11 miles off the Louisiana coast. The capsizing and sinking was the result of negligence on the part of the tool pusher and barge captain of the PM II and thus of PMI. In its submerged position, the PM II was located approximately 1500 feet south of a manned Shell Oil production platform and 300 feet southeast of an Exxon Pipeline Company 10-

1. *Progress Marine, Inc. v. Foremost Insurance Co.*, 1979 A.M.C. 70 (S.D. Tex. 1978).

inch high-pressure pipeline. Also in the vicinity were other offshore platforms, pipelines and additional offshore developmental properties.

At the time of this unfortunate incident, the PM II was covered by a standard P&I insurance policy, form SP-38, issued by Insurer. The Protection and Indemnity policy obligated Insurer to reimburse PMI for such sums as PMI shall have become legally liable to pay and shall have paid on account of:

> . . . Costs or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law . . .[2]

After the sinking of the PM II, little time was wasted by PMI in dealing with the situation. First, after considerable effort, PMI was able to rescue five crewmen trapped inside the submerged barge. PMI then pursued, unsuccessfully, various "sue and labor" activities, designed to prevent the barge from becoming a total loss. Finally, on June 10, 1975, PMI notified Insurer that the barge was a constructive total loss and that PMI had abandoned the wreck to Insurer. Insurer, in turn, rejected abandonment.

Unsuccessful in its sue and labor efforts PMI proceeded on the advice of counsel, to make arrangements for removing the PM II. On June 20, after receiving various bids, PMI contracted with Sun Salvors on a "No Cure-No Pay" basis to remove the wreck to PMI's premises in Morgan City, Louisiana. By August 21, Sun Salvors had performed the removal and PMI paid over $760,000

2. The clause continued ". . . provided, however, that there shall be deducted from such claim, the value of any salvage recovered from the wreck by the assured."

under the terms of the contract. In addition to this sum, PMI had incurred an additional $17,529.98 in expenses for wreck removal. PMI was able to recover $127,557 from the sale of the salvaged PM II, yielding a net recovery of $125,977 after deduction of expenses connected with the sale. Accordingly, after deducting these sums, and the $10,000 policy deductible, PMI made demand on Insurer in the total amount of $641,522.98 plus interest and attorneys' fees. This demand was refused by Insurer, although, for purposes of this litigation, Insurer has agreed that the expenses incurred were reasonable.

There is no question that PMI fit the bill of the "prudent company" in removing the PM II. At the time of these activities, hurricane season was approaching and the submerged barge posed a threat to neighboring oil production facilities and workers. In addition, the PM II, once it had settled, lay only eight feet below the surface of the water and posed a threat to navigation in the area, as PMI was clearly informed by the Coast Guard.[3] Nevertheless, Insurer argues that the removal, although perhaps compelled by prudence, was not "compulsory by law" as required by the express terms of the policy. The District Court agreed with Insurer and denied recovery by PMI. This appeal followed.

Compulsory By Law? A Judicial Sounding

The primary tasks before this Court—the successful resolution of which paves the way for the ultimate

3. Four days after the sinking of the PM II, the United States Coast Guard cabled PMI advising that the wreck constituted a hazard to navigation and instructing PMI to properly mark the wreck. *Progress Marine,* 1979 AMC at 71.

decision of the whole case—does not, at first blush, appear to be of Herculean proportions. We are simply asked to determine the meaning of the words "compulsory by law" as they are employed in the P&I policy which Insurer issued and PMI purchased. As simple as this task may initially appear, however, it is probably safe to say that the parties, and the courts, have already devoted more time and effort in resolving the meaning of these three words than was required in the cleaning of all the Augean stables.

At the outset, we emphasize that whether we employ California law, as PMI suggests may be required by *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337, 1955 A.M.C. 467 (1955),[4] or some other law is not particularly material to the resolution of this issue since there is no indication that land-based insurance principles concerning the construction of insurance policies vary significantly from marine principles. See *Calcasieu-Marine Nat. Bank, Etc. v. Am. Emp. Ins.*, 533 F.2d 290, 295 (5th Cir. 1976). A review of some of these principles provides us with buoys for interpreting this policy.

In *Calcasieu-Marine* this Court recognized these general principles:

> [W]ords are to be construed in their plain, ordinary, and popular sense. [Citations omitted]. This rule is varied from only if a word is used as a 'term of art',

4. The insurance policy was apparently issued in California. The parties themselves do not consider the choice of law question to be a significant issue in this case. To the extent that *Wilburn Boat* does require the application of California law, we find the general principles of construction which we rely on in this case to be consistent with the law of that state.

> in which case its meaning in the area for which it is a term of art is applied.

Id., 533 F.2d at 295-96.

This Court further reiterated in *Walter v. Marine Office of America*, 537 F.2d 89, 95, 1977 A.M.C. 1471, 1477-78 (5th Cir. 1976) what we had many times pronounced:

> Considering that a reviewing Court should view a contract in the light of the setting of the parties and the reasonable expectations as to risks and protection against them, an insurance policy should be construed in such a way as to effectuate its purpose.

Finally, it is a well established insurance law principle that the "insurance policy if uncertain in meaning should be construed against the insurer who wrote it and should be read literally so as to indemnify the insured." *Id.*, 537 F.2d at 94-95, 1977 A.M.C. at 1477; see also *Calcasieu-Marine*, 533 F.2d at 295.

This Court has never had occasion to address the precise questions raised by this case. Prior to launching into an independent analysis of the meaning of the term "compulsory by law", however, we deem it appropriate to briefly discuss decisions of other courts on this point.

The Second Circuit has authored an opinion as to the purport of a policy insuring against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory." This is certainly a close cousin of the policy in our case, if not an identical twin. In *Seaboard Shipping Corporation v. Jocharanne Tugboat Corporation*, 461 F.2d 500, 504, 1972 A.M.C. 2151, 2154 (2d Cir. 1972) that Court declared in awesome terms:

> '[C]ompulsory removal' is a term of art in admiralty law and refers to a situation in which a hull has been abandoned by the owner and the hull underwriter but, *pursuant to government order,* must be removed from navigable waters. Under those circumstances, the P&I underwriter, absorbing costs which no one else remains liable to pay, must remove the wreck or reimburse the government for removal. (Emphasis added).

District Courts in our own Circuit are evidently split in their interpretation of the meaning of removal "compulsory by law" in a marine insurance policy. The District Court in the instant case, although not citing *Jocharanne,* made findings seemingly consistent with the Second Circuit opinion. While stating that Insurer admitted that under the circumstances the wreck removal was prudent, and that the capsized PM II constituted a hazard to navigation, the District Court in concluding that the removal was not "compulsory by law", found that "at no time prior to its actual removal by plaintiff, did the United States Corps of Engineers, any other governmental body, or any court of competent jurisdiction order plaintiff to remove" the wreck. 1979 A.M.C. at 72-73. The Court further found that no governmental body had authority to order removal of the wreck. *Id.* at 73.

In a more recent opinion, another District Court in this Circuit reached a conclusion apparently at odds with *Jocharanne* and the District Court opinion in this case. In *Continental Oil Co. v. Bonanza Corporation,* ____ A.M.C.____ (S.D. Tex. 1980) [H-78-944, Aug. 25, 1980], the charterer of a vessel, which sank alongside an offshore rig, removed the wreck and then sought reimbursement from the insurer. In permitting direct action

against, and ultimately recovery from, the insurer, Judge Cire found:

> The policy contains a provision requiring the payment of wreck removal expenses, as here, when such removal is compulsory by law. [Insurer] points to the decisions of [*Jocharanne*] and [*Progress Marine*] as standing for the proposition that removal is "compulsory by law' only where written demand has been made by a governmental authority. But such a restrictive interpretation of the language is unjustified.

Although the Court in *Bonanza* did not articulate an interpretation as to the precise meaning of the term "compulsory by law", the Court clearly backed away from the notion that removal must be made pursuant to direct governmental order in order to warrant recovery.

As discussed previously, were we to conclude, as *Jocharanne* clearly suggests, that "compulsory by law" is a term of art in the marine insurance business, our initial inquiry would be at an end. We would simply apply the term of art meaning and conclude, as the Second Circuit stated, that removal must be specifically ordered by a governmental body to warrant coverage. Although we incline strongly to agree with PMI that the quoted section of the *Jocharanne* opinion which discusses compulsory removal is mere dicta,[5] we are unable simply to ignore the fairly unequivocal pronouncement by a distinguished Court so experienced in dealing with marine insurance.

---

5. The vessel in *Jocharanne* was removed as part of "sue and labor" activities. The vessel owner never attempted abandonment but rather had the vessel removed for the sole purpose of salvaging the hull. The "compulsory removal" provision of the insurance policy, therefore, never came into play. 461 F.2d at 504, 1972 A.M.C. at 2154.

However, upon independent examination of the authorities cited in *Jocharanne*[6] we are unable to agree with that Court that removal "compulsory by law" requires a peremptory order by an authoritative governmental agency.

Stripped of reliance on "compulsory by law" imposed by widely accepted maritime law as a term of art we must, as previously discussed, try to construe these words in their "plain, ordinary, and popular sense." *Calcasieu-Marine,* 523 F.2d at 295-96. Although these three words in and of themselves do not appear particularly inscrutable, in the lexicon of marine insurance we find resort to the dictionary to be useful, and find Black's Law Dictionary (4th ed.) particularly helpful.

Taking first the word "compulsory" *Black's* provides the following definition:

> Involuntary; forced; coerced by legal process or by force of statute.

For the word "by" *Black's* provides the following definition:

> In consequence of . . . through the means, act, agency or instrumentality of.

Finally, *Black's* defines "law" as:

> That which is laid down, ordained, or established. A rule or method according to which phenomena

---

6. At 461 F.2d at 504, 1972 A.M.C. at 2154, appears the following citation of authorities:
See the Wreck Removal Act, 33 U.S.C. §§ 409-414; Dover, A Handbook to Marine Insurance (6th ed. 1964) at 439. *Cf. Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967).

> or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences, is a 'law'.

Viewing these three words together as a phrase, it seems evident that "compulsory by law" in the context of this insurance policy should not be viewed as restricted to situations in which an express direct order from a governmental body directs removal. Clearly, for example, removal occasioned to avoid a violation of a criminal statute subject to criminal sanctions, although not specifically ordered by governmental authority, would nevertheless be compelled by law. On the other hand we are not prepared to say that removal occasioned by *any* "legal obligation" is "compulsory by law", as PMI would seem to suggest.[7]

---

7. As authority for the proposition that removal "compulsory by law" connotes any removal performed pursuant to a "legal obligation" PMI refers us to L. Buglass, Marine Insurance and General Average in the United States (1973), pp. 64-65:

> Protection and Indemnity underwriters do cover wreck removal expenses but it must be emphasized that, absent any specific agreement to the contrary, underwriters insuring wreck removal expenses are only liable if their assured is *legally liable* for removing the wreck. Under such Protection and Indemnity coverage the assured usually remains protected and indemnified for as long as he has a possible liability. Thus, if the insured vessel sinks as a result of the original accident and the wreck cannot be located but resurfaces at a later date, any *legal liability* falling on the assured to remove the wreck is covered by the original insurance. (Emphasis the author's).

While Buglass may correctly state a general proposition concerning insurance for wreck removal, we are disinclined to rely on this authority in resolving the present controversy. It is certainly arguable that the inclusion of the words "compulsory by law" in the insurance policy before us was reasonably intended, and reasonably understood, to restrict recovery to cases where something more than simple exposure to "legal liability" exists.

As stated in *Walter*, 537 F.2d at 95, 1977 A.M.C. at 1477-78, in construing an insurance policy reference must be made to the reasonable expectations of the parties as to the risks and protection against them. As applied to this case, removal occasioned by an unarticulated or unreasonable apprehension of criminal or civil liability could not be considered "compelled by law". On the other hand, where removal was reasonably required by law, or where failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered "compelled by law" for purposes of recovery. However, an additional inquiry must be made as to whether the removal was in fact "compelled by law," that is, whether removal was performed as a result of a subjective belief on the part of the insured that such was reasonably necessary to avoid legal consequences of the type contemplated by this policy.[8]

While we do not pass final judgment on this case, nor make a forecast as to the ultimate judgment of the District Court on remand, we believe that on the facts presently before the Court it at least cannot be said that no possibility for recovery by PMI exists under the legal standard which we have announced. Certainly, for example, potential exposure to PMI resulting from its wreck

8. This "objective" and "subjective" inquiry which we deem appropriate in this case is akin to the dual inquiry as to the availability of "good faith" immunity in certain actions under 42 U.S.C. § 1983. *Cf. Wood v. Strickland*, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); *Dilmore v. Stubbs*, 636 F.2d 966 (5th Cir. 1981); *Bryan v. Jones*, 530 F.2d 1210, 1214 (5th Cir.) (En Banc), *cert. denied*, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976).

rupturing an oil pipeline or breaching the hull of an oil carrying vessel could have been enormous. Although we do not undertake to address the reasonable probabilities of the occurrence of these or similar casualties, we nevertheless raise here several points of liability which such casualties could have engendered.

We note that at the time of the sinking of the PM II, the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1321,[9] prohibited the discharge of oil into or upon waters adjoining the United States at least within twelve miles from shore.[10] This Act expressly provided for third party liability to the United States Government, in certain circumstances, for oil spill removal costs. *Id.*, at § 1321(g). Furthermore, PMI would have been without resort to any available limitation if it could have been shown that the oil discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of [PMI]." *Id.* We raise, without addressing, the potential relevance of the fact that legislation enacted after the 1975 sinking of the PM II imposes increased statutory liability for oil spills. See, e.g., the Clean Water Act of 1977, 33 U.S.C. § 1321.

In addition to this statutory liability to the United States, in the event of a major oil spill caused by its negligence PMI also could have potentially faced enor-

9. The FWPCA has been amended by the Clean Water Act of 1977, 33 U.S.C. § 1321. The complete text of the FWPCA may be found in 3 Benedict on Admiralty (7th ed. 1975), 9-23-9-40.3.

10. The actual language of the Act proscribes discharge of oil into or upon "waters of the contiguous zone." 33 U.S.C. § 1321 (b)(1). The contiguous zone was contemplated as extending 12 miles from the coast of the United States. See § 1321(a)(9) together with 37 Fed. Reg. 11906 (1972); see also 3 *Benedict on Admiralty* at 9-11, n.10.

mous damages under private actions for pollution damage. For these claims, even if PMI could have established that the PM II was a "vessel" entitling PMI to limitation under the Limitation of Liability Act of 1851, 46 U.S.C. §§ 181 *et seq.*, it is quite possible that PMI still could not have successfully invoked limitation for the sinking of the PM II. And in any event, its liability in these possible risk situations would have been for failure to remove the wreck which might constitute personal fault within the privity and knowledge of the owner. See, e.g., *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 448, 1977 A.M.C. 2607, 2618-19, and cases discussed in n.13 (5th Cir. 1977).

Hauling The Dispute Back To Port

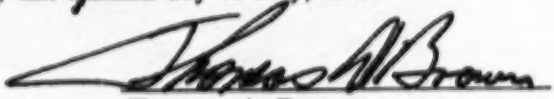
Since the District Court's opinion was rendered in the light of an interpretation of the controlling language in the insurance policy which was erroneous, we cannot credit the findings of the Court as presently made. See *Kirksey v. City of Jackson, Mississippi*, 625 F.2d 21, 21-22 (5th Cir. 1980); *NLRB v. Alterman Transport Lines*, 587 F.2d 212, 220 (5th Cir. 1979); *Theriault v. Silber*, 547 F.2d 1279, 1280 (5th Cir.), *cert. denied*, 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977); *Costello v. Lipsitz*, 547 F.2d 1267, 1276-77 (5th Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88 (1977). We similarly do not pass on the Court's legal finding that no governmental authority was empowered to order removal of the wreck of the PM II sunk 11 miles off the Louisiana coast since this finding, even if true, is not necessarily dispositive of the case. We reiterate that by our observations concerning potential

liability to PMI for failure to remove the wreck we make no intimations as to the ultimate disposition of this case. We remand this action in full to the District Court to make the dual inquiry described in this opinion, leaving initially to the parties and the District Court to determine the extent to which the present record should or need be supplemented.

VACATED and REMANDED.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari filed on behalf of Petitioners, Foremost Insurance Company, Grand Rapids, Michigan, were duly served upon Respondent, Progress Marine, Inc., by placing same in the United States mail, first-class postage prepaid and addressed to Mr. E. V. Greenwood, Fulbright and Jaworski, Bank of the Southwest, Houston, Texas 77002, Attorneys for Respondent in accordance with Rule 28.3 of the Rules of the Supreme Court, this 9th day of July, 1981.



THOMAS A. BROWN
Lead Counsel for Petitioner

Office-Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-66

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN,
Petitioner

v.

PROGRESS MARINE, INC.,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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I

INFORMATION AS TO AFFILIATION OF CORPORATIONS REQUIRED BY RULE 28.1

Respondent's Parent Company:

Buttes Gas & Oil Co.

Affiliates of Respondent:

Buttes Resources Company
Nor-Am Exploration Corporation
Tribal Oil Corporation
Buttes Gas & Oil Co. International
Buttes Resources Canada, Ltd.
Buttes Resources Guinea, Inc.
Buttes Resources International, Inc.
Buttes Resources Tunisie, Ltd.
Sharjah Petroleum Corporation
Buttes Argentina S.A.
Unlimited Resources, Inc.
Juniper Petroleum Corporation
Crescent Petroleum Company
Buttes Resources Northern, Ltd.
Buttes Resources Guatemala, Inc.
Buttes Resources Nicaragua, Inc.
Buttes Resources Peru, Inc.
Buttes Resources Yugoslavia, Inc.
Progress Drillers, Inc.
Progress Drilling-A Company
Progress Drilling-B Company
Dolphin International, Inc.
Dolphin Casablanca Co. Inc.
DDA Company
DDB Company
Dolphin do Brasil Servicos do Perfuracoes, Ltda.
Dolphin Drilling Co.
Dolphin International S.A.
Dolphin International (S) Limited
Dolphin Drilling Supply Limited
Dolphin Drilling (UK) ltd.

Progress Drilling International, Inc.
Progress Supply, Inc.
Progreso Perforaciones Petroleras S.A.
Progress Perfuracoes do Brasil, Ltda.
Buttes Farmland Development Co.
Crescent Farms Company
Treegrove Management Corp.
Treegrove 1971 Management Corp.
White River Farms
Hills Valley Growers, Inc.
Valley Lemon Growers, Inc.
Cranco
Treecrop Company
1971 Treecrop Company
Crescent Engineering Company
Crescent International, Inc.
Humphreys Engineering Company
Al Hack and Associates
Crescent Export Company
Crescent Export Corporation
Creede Mines, Inc.
Pelican Flight, Inc.
Progressive Marine Insurance
Company, Ltd.

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NO. 81-66

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN,
Petitioner

v.

PROGRESS MARINE, INC.,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because:

(1) There is no true conflict between holdings of the Second Circuit and Fifth Circuit for the reasons that (a) the two cases in question are factually different in several material respects and that (b) the so-called "holding" of the Second Circuit is actually mere dictum.

(2) An examination of the authorities cited by the Second Circuit for the proposition that the words "compulsory by law" in the insurance policy are "words of art" reveals that such authorities do not support the proposition. It is also true that Peti-

tioner's "expert" testimony on this issue in the trial court was not only inadmissible under the applicable authorities, but also was in conflict with Respondent's evidence on the same point. As such, the problem presented by the "expert" testimony is largely an evidentiary matter rather than an important federal question requiring resolution by this Court.

The Respondent, Progress Marine, Inc. (Plaintiff in the trial court) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That decision is reported at 642 F.2d 816 (5th Cir. 1981).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The conflict in decisions suggested by Petitioner as a basis for seeking the writ of certiorari should not be regarded by this Court as a true conflict in decisions because the facts of the two cases are different in several material respects, and the language of the Second Circuit relied on by Petitioner as conflicting with the Fifth Circuit decision is mere dictum.

Petitioner relies on certain language in the opinion of the United States Court of Appeals for the Second Circuit in *Seaboard Shipping Corp. v. Jocharanne Tug Boat Corporation,* 461 F.2d 500 (2nd Cir. 1972) for the proposition that the words "compulsory by law" in the applicable policy of insurance preclude recovery of wreck removal expenses in the absence of an order of the United States government, a United States court or similar authority. Respondent respectfully submits that the language relied on by Petitioner to assert such conflict is in fact

not a decision at all, but is mere dictum or make weight material unnecessary to the decision in the case.

The Fifth Circuit all but so characterized such language when it stated on page 819 of 614 F.2d:

> "Although we incline strongly to agree with PMI that the quoted section of the *Jocharanne* opinion which discusses compulsory removal is mere dicta, we are unable simply to ignore the fairly unequivocal pronouncement by a distinguished Court so experienced in dealing with marine insurance."

In footnote five following the word "dicta" in the above quoted material from the Fifth Circuit opinion, the court said:

> "5. The vessel in *Jocharanne* was removed as part of 'sue and labor' activities. The vessel owner never attempted abandonment but rather had the vessel removed for the sole purpose of salvaging the hull. The 'compulsory removal' provision of the insurance policy, therefore, never came into play. 461 F.2d at 504, 1972 A.M.C. at 2154."

Additional reasons why the language in *Jocharanne* should be characterized as mere dicta are as follows:

> (1) The opinion in *Jocharanne* itself described the expenses in that case as "sue and labor" expenses, as distinguished from "wreck removal" expenses. (See Petition of Certiorari at B-5).
>
> (2) The protection and indemnity policy in *Jocharanne* agreed to reimburse *only* expenses paid by the assured, whereas in *Jocharanne* the expenses were paid by and on behalf of hull underwriters, who had no rights under the protection and indemnity policy. (See Petition of Certiorari at B-7, footnote 5).

(3) The protection and indemnity policy in *Jocharanne* expressly excluded coverage of expenses recoverable under the hull policy in the case, and the expenses in question, as sue and labor expenses, were most certainly so covered by the hull policy. (See Petition of Certiorari at B-7, footnote 5).

(4) At the time the expenses in *Jocharanne* were incurred, there had been no abandonment of the vessel and, therefore, there was no wreck to remove; hence, there could be no wreck removal expenses. (See Petition of Certiorari at B-7).

(5) There was an "other insurance" provision in the protection and indemnity policy in *Jocharanne* precluding recovery under the policy where there was other parallel coverage, as under the hull policy in *Jocharanne*. (See Petition of Certiorari at B-8 and 9).

There being all of the above bases, and perhaps others, for reversal of the trial court's judgment in *Jocharanne*, it would appear that the learned appellate court in *Jocharanne* added the language regarding wreck removal coverage (the dicta relied on by Petitioner in the case at bar) as a mere make weight or after thought and therefore as dictum.

In view of all of the foregoing, it is respectfully submitted that, far from having *decisions* of circuit courts in conflict, the only conflict here is between a dictum of the Second Circuit and the very carefully considered holding of the Fifth Circuit in the case at bar.

2. There being no legal authority other than the dictum in *Jocharanne* for the proposition that the term "compulsory by law" has the restrictive "words of art" meaning asserted by Petitioner, and the so-called "expert" testi-

mony in the trial court being in conflict, this Court should not disturb the well-reasoned opinion of the Fifth Circuit on this point.

The Fifth Circuit carefully examined the authorities cited by the Second Circuit in *Jocharanne* for the proposition that the words "compulsory by law" are "words of art" having the meaning asserted by the Second Circuit and found that the cited authorities do not support the proposition. (See 642 F.2d at 819). There being no other known legal or textual authority for this dictum of the Second Circuit, it would appear that there can be no real conflict between such dictum and the careful contrary holding of the Fifth Circuit. Furthermore, the conclusion of the Fifth Circuit is also supported by the text of Mr. H. L. Buglass (Heep L. Buglass, Marine Insurance and General Average in the U. S. (1973)) cited and quoted by the Fifth Circuit in footnote 7. at 642 F.2d 820, whereas no text material has been found supporting the position asserted in the dictum of the Second Circuit. All three of Petitioner's "expert" witnesses testified that they had never seen any textual material supporting the foregoing proposition asserted in dictum by the Second Circuit.

As to the so-called "expert" testimony cited and discussed on pages 16-19 of the Petition for Writ of Certiorari, there is first of all a substantial question as to the admissibility of such testimony for the reason that there was no evidence that Respondent's people had any knowledge of the so-called "word of art" meaning of the term advanced by Petitioner's "experts". In the absence of a predicate in the form of proof of such knowledge, the evidence was inadmissible. See 9 *Wigmore on Evidence*, § 2464 (3rd ed. 1940) where the following appears:

> "Where all the parties are members of the *same trade* or other circle of persons, little difficulty can arise; the only requirement is that the special sense alleged should be in fact a usage or settled habit of expression, and not merely the expression of a few persons or of casual occasions. (Citing cases). But when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear (on the principle of § 2466, post). For this purpose, his *actual knowledge* of the particular sense as applicable to the transaction would suffice; otherwise it must appear to be so generally known in the community that his actual individual knowledge of it may be inferred. (Citing cases). The application of the general principle will then be a mere question of the probabilities of meanings for each case."

For cases so holding, the Court is respectfully referred to *New York Life Ins. Co. v. Federal Nat. Bank, Etc.*, 143 F.2d 69 (10th Cir. 1944), wherein the Court held an interpretation given to a term in a life insurance policy known only to the insurance company and not to the insured was not admissible against the insured. That the law of California, where Petitioner's policy was issued, is to similar effect is shown by the cases of *Lynch v. Bekins Van & Storage Co.*, 157 P. 822 (Cal. App. 1916); *Latta v. Da Roza*, 280 P. 711 (Cal. App. 1929); and *Exchange Lemon Products Co. v. Home Insurance Co.*, 235 F.2d 558 (9th Cir. 1956).

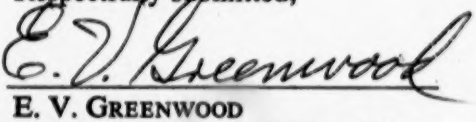
Not only was there a substantial question as to admissibility of this type of testimony under the circumstances of this case, there was also contrary testimony from witnesses Ellison and Hunt, the latter an expert on marine insurance called by Respondent in the trial court to rebut the so-called "expert" testimony received over objection by the trial court from the Petitioner.

In any event, it would appear that the problem suggested by all of this testimony, in the conflicting state in which it exists, is an evidentiary one and not a serious question of federal law that should concern this Court, particularly where the decision called in question is one that has been very carefully considered by a highly competent admiralty court showing clearly on its face that traditional rules regarding the interpretation of policies of insurance were strictly and fairly adhered to. Please see *Gray v. Zurich Insurance Company*, 65 Cal.2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); *Fannon v. Travelers Ins. Co.*, 548 S.W.2d 460 (Tex. Civ. App.—Waco 1977, no writ); and *Walter v. Marine Office of America*, 537 F.2d 89 (5th Cir. 1976).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition filed on behalf of Respondent, Progress Marine, Inc., were duly served upon Petitioner, Foremost Insurance Company, Grand Rapids, Michigan, by placing same in the United States mail, first-class postage prepaid and addressed to Mr. Thomas A. Brown, Brown, Sims & Ayre, Suite 1735, 2000 South Post Oak Blvd., Houston, Texas, 77056, Attorneys for Petitioner in accordance with Rule 28.3 of the Rules of the Supreme Court, this 31 day of July, 1981.

E. V. Greenwood

E. V. GREENWOOD
Lead Counsel for Respondent